Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHELLE M. VALENCIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does 7 U.S.C. § 13(a)(2) give sufficient notice of the conduct it prohibits to be criminally enforceable consistent with due process?

2. Is 7 U.S.C. § 13(a)(2) unconstitutionally overbroad because it is not sufficiently narrowly tailored to serve only the compelling governmental interest?

3. Is 7 U.S.C. § 13(a)(2) unconstitutionally overbroad by criminalizing unknowingly false or misleading speech?

4. Does the Fifth Circuit's decision violate canons of statutory construction and ignore the plain reading of 7 U.S.C. § 13(a)(2)?

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CITATIONS OF BELOW OPINIONS

United States of America v. Valencia; No. 03-21217 in the United States Court of Appeals for the Fifth Circuit; *United States v. Valencia*, 394 F.3d 352 (5th Cir. 2004), United States District Court No. 03-CR-24, United States District Court for the Southern District of Texas.

BASIS FOR JURISDICTION

On November 13, 2003, the district court dismissed portions of an indictment against Petitioner. The United States appealed the trial court's decision to the Fifth Circuit Court of Appeals. On December 17, 2004, the Fifth Circuit Court of Appeals reversed the decision of the trial court. [App. 1] On January 3, 2005, Petitioner filed a Petition for Rehearing and a Suggestion for Rehearing En Banc. The Order denying Petitioner's Petition for Rehearing and Suggestions for Rehearing En Banc was filed January 13, 2005. [App. 82] This petition is filed within 90 days of that date. The jurisdiction of this court to review the judgment on petition for writ of certiorari rests upon 28 U.S.C. § 1254(1) and Supreme Court Rule 10.

CONSTITUTIONAL PROVISIONS

AMENDMENT I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner is charged by Indictment with being an employee of Dynegy, Inc., a publicly traded Illinois corporation with headquarters at 1000 Louisiana Street in Houston, Texas. Dynegy Marketing & Trade is a general partnership owned by Dynegy and is a natural gas marketer maintaining a trading operation and trade floor at 1000 Louisiana Street in Houston, Texas. Petitioner is alleged to have been a natural gas trader on Dynegy's "West Desk" and as such was engaged in the business of *buying and selling wholesale natural gas* for profit, by entering into transactions calling for the physical delivery of natural gas. There is no allegation, or proof, that Petitioner was involved in the trading of futures contracts for natural gas. Petitioner is not charged with manipulating or attempting to manipulate the natural gas commodity market or any other markets.

Physical trades occur at fixed prices or index prices. Certain index prices were published by an industry newsletter, *Inside FERC Gas Market Report* ("*Inside FERC*"). *Inside FERC* produced indexes by using information obtained from traders during monthly surveys. This information was obtained near the end of each month, through polls of various parties throughout the natural gas industry. The publisher of *Inside FERC* then considers the responses (to some unknown degree) and applies an unknown methodology to calculate an index. An index represents a historical value, by location, which is derived from the publisher's subjective assessment of survey responses combined with other factors (such as weather, amount of gas stored, etc.).

On January 22, 2003 Petitioner was indicted for violating 7 U.S.C. § 13(a)(2) of the Commodity Exchange Act by reporting false, misleading or knowingly inaccurate information in her survey response to *Inside FERC*. On April 7, 2003, Petitioner filed motions to dismiss Counts One, Two and Three of the indictment, asserting that 7 U.S.C. § 13(a)(2) should be declared unconstitutionally overbroad due to the lack of a specific scienter for delivery for false or misleading reports. Additionally, Petitioner moved the district court to declare 7 U.S.C. § 13(a)(2) unconstitutionally vague and moved to dismiss Counts One, Two and Three on the grounds that the Commodity Exchange Act was being misapplied to the alleged conduct.

On August 26, 2003 the district court granted in part and denied in part Petitioner's motions to dismiss based on overbreadth and denied the other motions to dismiss. The United States requested that the district court reconsider its ruling or, in the alternative, to sever the unconstitutional portions of the statute allowing the United States

to proceed on the allegation that Petitioner knowingly delivered knowingly inaccurate reports.

On November 13, 2003, the district court reconsidered its prior ruling, and dismissed the portions of Counts One, Two, and Three of the Indictment charging that Valencia "did knowingly deliver and cause to be delivered . . . false and misleading" reports. The United States appealed the dismissal of that portion of Counts One, Two and Three. The Fifth Circuit Court of Appeals, on December 17, 2004, reversed the trial court, holding that 7 U.S.C. § 13(a)(2) is not unconstitutional. Petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc. Those petitions were denied on January 13, 2005. This petition follows.

ARGUMENT

I. 7 U.S.C. § 13(a)(2) VIOLATES THE FIFTH AMENDMENT

A. A brief history of the Commodity Exchange Act (7 U.S.C. § 1, et seq.)

In 1922, the legislature passed the Grain Futures Act in response to speculative excesses and price manipulation on the grain exchanges during a period of declining commodity prices and the farming depression. [App. 92] (GAO/GGD-99-74; United States General Accounting Office Report to Congressional Committees [Appendix IX], May 1999). The primary design of the Grain Futures Act of 1922 was to enable the government to deal with the exchanges themselves, rather than with individual traders. In order to conduct futures trading lawfully, the exchanges were required to be designated as "contract

markets." A condition of such designation was that the exchanges themselves would take major responsibility for prevention of price manipulation by their members. *Id.* In 1936, the legislation was renamed the Commodity Exchange Act and regulatory coverage was extended to cotton and other specified commodities. *Id.* Additional authority was granted to deal with market abuses by traders generally as well as exchange members, to prosecute price manipulation as a criminal offense, to curb excessive speculation by the large market operator, and to extend regulation to the previously uncovered field of commodity brokerage in order to suppress cheating, fraud and fictitious transactions in futures which were seriously impairing the services of the market. *Id.* Between 1936 and 1968, there were several minor amendments to the Commodity Exchange Act which brought additional commodities under regulation. *Id.* In 1968, Congress made changes in the Act requiring that futures commission merchants meet specified minimum financial standards, increased the penalties for certain law violations such as manipulation and embezzlement, authorized issuance of cease and desist orders, required contract markets to enforce their trading rules and contract terms, and brought under regulation livestock, livestock products and frozen concentrated orange juice. *Id.*

The Commodity Futures Trading Commission Act of 1974 expanded the Commodity Exchange Act coverage from the statutory list of enumerated physical commodities to include all goods, articles and services in which a futures contract is traded. *Id.* The Act also created the Commodity Futures Trading Commission, providing it with enforcement and oversight powers. The Commodity Futures Trading Commission Act also increased criminal

penalties for violations of anti-fraud, anti-manipulation and other provisions of the Act. Thereafter, there were the Futures Trading Acts of 1978, 1982 and 1986, which provided more regulation and guidelines for the CFTC. In 1982 it codified the Shad-Johnson Jurisdictional Accord, an agreement between the CFTC and the SEC which clarified their jurisdictions with respect to securities-related instruments. *Id.* In 1992 the Futures Trading Practices Act authorized the CFTC to grant exemptions from most provisions of the Commodity Exchange Act and provided legal certainty for the over-the-counter derivatives market. *Id.* Finally, in 2000, the Commodity Futures Modernization Act codified swap exclusions and legal certainty for transactions in exempt commodities, and further provided legal certainty in the markets for certain derivatives and futures transactions.

B. Wholesale markets and the Commodity Exchange Act.

During the hearings on the bill that became the initial Act, Senator Capper, the sponsor of the Senate version of the bill, explained:

> The bill does not concern itself at all with the sale or purchase of actual grain, either for present or future delivery. *The entire business of buying and selling the actual grain, sometimes called 'cash' or 'spot' business is expressly excluded.* It deals only with the 'future' or 'pit' transaction in which the transfer of actual grain is not contemplated. (Emphasis added)

61 Cong. Rec. 4762, 67th Cong., 1st Sess. (August 9, 1921). *See* hearings on H.R. 168, 231, 2238, 2331, 2363 and 5228 before the House Committee on Agriculture, 67th Cong.,

1st Sess. 24 (1921). This sentiment was repeated by the Commodity Futures Trading Commission in its final order pertaining to the Commodity Futures Modernization Act on December 13, 2000, and its applicability to cash markets, wherein it stated:

> . . . [T]he Commission does not require that cash markets, such as those described above, come within the regulatory framework. Centralized markets to trade spot and forward agricultural commodities have long existed outside the regulatory scheme that applies to futures and option markets. The Act, and the regulatory framework thereunder, apply to markets that trade futures or option contracts on such underlying commodities. *Accordingly, there is no inconsistency between the Commission's regulation of futures markets and regulation of the underlying cash markets by other regulators, such as the FERC or the states.* To the contrary, the Commission in its oversight of the futures and option markets coordinates and cooperates with the regulators of related underlying cash markets. 65 FR 77961, 77965-66 (Dec. 13, 2000). (Emphasis added)

More recently, James E. Newsome, chairman of the Commodity Futures Trading Commission, in hearings before the Senate Subcommittee on Energy and Air Quality and the Committee on Energy and Commerce in the House of Representatives, on February 13, 2002, stated:

> The commission oversees *on-exchange trading* of energy-related futures and options contracts based on such things as crude oil, natural gas, heating oil, propane, gasoline and coal. Several U.S. exchanges are designated to trade energy products, futures and options, but the

> overwhelming majority of on-exchange transactions are executed on the New York Mercantile Exchange (the Nymex), where contracts and each of the products I mentioned are actively traded. *The CFTC does not regulate trading of energy products on spot (cash) markets or forward markets, which are excluded from our jurisdiction by the CEA.* (Emphasis added)

C. 7 U.S.C. § 13(a)(2) fails to give adequate notice of what conduct is forbidden.

As the above history and application illustrates, Congress never intended the Commodity Exchange Act to include wholesale buying and selling of goods, even if those goods can be traded on a commodity exchange. The allegations in the indictment are that Defendant was engaged in wholesale physical trades of natural gas on the West coast of the United States, and her activities, including the alleged activities associated with reporting to *Inside FERC*, are not within the purview of the Commodity Exchange Act. There is nothing within the Act or the legislative history to put Petitioner on notice that her actions could subject her to criminal prosecution pursuant to the Commodity Exchange Act.

To Petitioner's knowledge, the criminal application of 7 U.S.C. § 13(a)(2) is a matter of first impression with this Court and the statute has never withstood the rigors of a due process inquiry. Due Process requires that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also, City of Chicago*

v. Morales, 527 U.S. 41, 56 (1999). A criminal statute that fails to meet this standard on its face is void and cannot be enforced. *See Village of Hoffman Estates v. Flipside Hoffman Estates Inc.*, 455 U.S. 489, 494 (1982).

This Court has previously explained:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (citations omitted).

Justice Souter in *United States v. Lanier*, 520 U.S. 259 (1997) discussed more fully the "fair warning" requirement of due process:

> There are three related manifestations of the fair warning requirement. First, the vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*,

269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926); accord, *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983); *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939). Second, as a sort of "junior version of the vagueness doctrine," H. Packer, The Limits of the Criminal Sanction 95 (1968), the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. See, e.g., *Liparota v. United States*, 471 U.S. 419, 427, 105 S.Ct. 2084, 2089, 85 L.Ed.2d 434 (1985); *United States v. Bass*, 404 U.S. 336, 347-348, 92 S.Ct. 515, 522-523, 30 L.Ed.2d 488 (1971); *McBoyle*, [McBoyle v. United States, 283 U.S. 25, 27, 51 S.Ct. 340, 341, 75 L.Ed. 816 (1931).] supra, at 27, 51 S.Ct., at 341. Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, see, e.g., Bouie, supra, at 357-359, 84 S.Ct., at 1704-1706; *Kolender*, supra, at 355-356, 103 S.Ct., at 1856-1858; *Lanzetta*, supra, at 455-457, 59 S.Ct., at 619-621; Jeffries, Legality, Vagueness, and the Construction of Penal Statutes, 71 Va. L.Rev. 189, 207 (1985), due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope, see, e.g., *Marks v. United States*, 430 U.S. 188, 191-192, 97 S.Ct. 990, 992-993, 51 L.Ed.2d 260 (1977); *Rabe v. Washington*, 405 U.S. 313, 92 S.Ct. 993, 31 L.Ed.2d 258 (1972) (per curiam); Bouie, supra, at 353-354, 84 S.Ct., at 1702-1703; cf. U.S. Const., Art. I, § 9, cl. 3; id., § 10, cl. 1; Bouie, supra, at 353-354, 84 S.Ct., at 1702-1703 (Ex Post Facto Clauses bar legislatures from

> making substantive criminal offenses retroactive). In each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal. *Id.* at 266, 267.

In the present case, there is no notice to Petitioner that her conduct would be governed by the Commodity Exchange Act. There are no prior enforcement actions which would provide Petitioner with that notice. Congress granted the Federal Energy Regulatory Commission (FERC), not the CFTC, exclusive jurisdiction over sales of wholesale natural gas in interstate commerce. 7 U.S.C. § 13(a)(2) is void in that it does not provide adequate notice to satisfy due process requirements.

D. 7 U.S.C. § 13(a)(2) fails to give adequate guidelines to law enforcement

Additionally, 7 U.S.C. § 13(a)(2) fails to provide law enforcement with adequate guidelines to avoid arbitrary and discriminatory enforcement as evidenced by the conflicting positions taken by separate government agencies regarding the scope of the Commodity Exchange Act. The CFTC has repeatedly taken the position that the provisions of the CEA (presumably including its criminal provisions) do not apply to the cash markets in any way and that the cash markets are regulated by the FERC. (*See* Section I., B above) In the present case, the Government has taken the position that the provisions of § 13(a)(2) apply to any person who knowingly delivers a false, misleading or knowingly inaccurate statement that affects or tends to affect the price of a commodity in interstate commerce. This is in direct conflict with both

the prior statements of the CFTC and the statements issued by the Energy Information Administration of the United States Department of Energy. The Department of Energy has stated that the provisions of the CEA do not apply to statements about cash transactions in natural gas. [App. 91] This conflict was recognized by the trial court during the hearing held on Petitioner's Motions to Dismiss. [App. 86] At the hearing on Petitioner's motions to dismiss, the Assistant United States Attorney initially questioned the accuracy of the Department of Energy statement asserting that it was a "legal opinion" regarding the coverage of the CEA, then quickly changed positions stating: " . . . I didn't mean to suggest I don't think it's accurate. I'm sure they've got it 100 percent right." *Id.*, p. 156. The conflicting interpretations of the regulatory scope of the CEA, and specifically 7 U.S.C. § 13(a)(2), are the clearest possible indication of the lack of guidelines for law enforcement. The fact that separate Departments of the United States Government (Department of Energy and Department of Justice) cannot agree as to whether statements about cash transactions in natural gas are exempt from regulatory oversight under the CEA is evidence of speculation by law enforcement as to what the statute criminalizes.

The Fifth Circuit Court of Appeals failed to consider Petitioner's requests for alternative relief on the above grounds in her initial brief. The Due Process implications of criminal prosecutions under the relevant provisions of the Commodity Exchange Act is an important question of federal law that should be settled by this Court. Review of these questions by this Court is proper to protect Petitioner's due process rights.

II. 7 U.S.C. § 13(a)(2) VIOLATES THE FIRST AMENDMENT.

A. The statute is insufficiently narrowly tailored to prohibit only the speech necessary to protect the compelling governmental interest

Because 7 U.S.C. § 13(a)(2) is a content-based limitation on speech, this Court should review its constitutionality applying the strict scrutiny level of review. In order to survive a strict scrutiny review, the statute must be narrowly tailored to prohibit only the speech necessary to protect the compelling governmental interest. *See United States v. Playboy Entertainment Group, Inc.*, 120 S.Ct. 1878, 1888 (2000), *citing Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989). If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative. *Playboy, id., citing Reno v. American Civil Liberties Union,* 521 U.S. 844, 857, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

The purported legitimate governmental interest in limiting free speech is contained in the Findings and Purpose provisions of the Commodity Exchange Act:

> **(a) Findings**
>
> The transactions subject to this chapter are entered into regularly in interstate and international commerce and are affected with a national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities.

> **(b) Purpose**
>
> It is the purpose of this chapter to serve the public interests described in subsection (a) through a system of effective self-regulation of trading facilities, clearing systems, market participants and market professionals *under the oversight of the Commission*. To foster these public interests, it is further the purpose of this chapter to deter and prevent price manipulation or any other disruptions to market integrity; to ensure the financial integrity of all transactions subject to this chapter and the avoidance of systemic risk; to protect all market participants from fraudulent or other abusive sales practices and misuses of customer assets; and to promote responsible innovation and fair competition among boards of trade, other markets and market participants.

7 U.S.C. § 5 (emphasis added)

Any prohibition or limitation of speech which is not narrowly tailored to promote only the above interest fails strict scrutiny review. *Playboy*, *id*. As the current prosecution shows, the statute is not sufficiently narrowly tailored to protect only the compelling governmental interest because there has been no allegation that Petitioner's conduct affected or involved the commodity futures markets.

B. 7 U.S.C. § 13(a)(2) is unconstitutionally overbroad for failing to require that the individual knew that the report he or she delivered was false or misleading.

Title 7 U.S.C. § 13(a)(2) of the Commodity Exchange Act (CEA), reads in pertinent part:

§ 13. Violations generally; punishment; costs of prosecution

(a) Felonies generally

It shall be a felony punishable by a fine of not more than $1,000,000 (or $500,000 in the case of a person who is an individual) or imprisonment for not more than five years, or both, together with the costs of prosecution, for:

* * *

(2) Any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or to corner or attempt to corner any such commodity or *knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce,*[. . .]

7 U.S.C. § 13 (emphasis added)

The issue, as addressed by both the district court and Fifth Circuit Court of Appeals, is the placement and usage of the terms "knowingly" and the requirement of scienter in criminal statutes. More specifically, does the knowledge requirement of the "reporting prong" apply to the false and misleading character of the reports as well as to the delivery and inaccuracy? The district court held that a plain reading of the statute indicated that the term knowingly modified "deliver or cause to be delivered" and that the failure of the statute to include a *mens rea* regarding

"false or misleading" rendered the statute unconstitutional. Reversing, the Fifth Circuit Court of Appeals held that the first "knowingly" modified "false and misleading" as well as "deliver" and "inaccurate," thereby rendering the second "knowingly" before "inaccurate" as surplusage. The Fifth Circuit justified this decision arguing that this Court's precedent dictates that the statute be read narrowly to prevent unconstitutionality in spite of the Court's agreement that their reading is not the "natural" reading of the statute.

The canon of construction that a court should strive to interpret a statute in a way that will avoid an unconstitutional construction is useful in close cases, but it is "not a license for the judiciary to rewrite language enacted by the legislature." *Chapman v. United States*, 500 U.S. 453, 456, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991), *citing United States v. Monsanto,* 491 U.S. 600, 611, 109 S.Ct. 2657, 2664, 105 L.Ed.2d 512 (1989). As this Court stated in *United States v. Albertini,* 472 U.S. 675 (1985):

> Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language. *Garcia v. United States,* 469 U.S. 70, 75, 105 S.Ct. 479, 482, 83 L.Ed.2d 472 (1984); *United States v. Turkette,* 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981). "[O]nly the most extraordinary showing of contrary intentions" in the legislative history will justify a departure from that language. *Garcia, supra,* 469 U.S. at 75, 105 S.Ct., at 482. This proposition is not altered simply because application of a statute is challenged on constitutional grounds. Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite

> language enacted by the legislature. *Heckler v. Mathews,* 465 U.S. 728, 741-742, 104 S.Ct. 1387, 1396, 79 L.Ed.2d 646 (1984). Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution. *United States v. Locke*, 471 U.S. 84, 95-96, 105 S.Ct. 1785, 1793-1794, 85 L.Ed.2d 64 (1985). Proper respect for those powers implies that "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194, 105 S.Ct. 658, 662, 83 L.Ed.2d 582 (1985)."

Albertini, at 680.

The Fifth Circuit Court of Appeals' decision to ignore the plain and unambiguous statutory language can only be justified if a review of the legislative history reveals "the most extraordinary showing of contrary intention." *Id.* The Fifth Circuit opinion at fn. 2 on p. 7 admits that the legislative history provides "no salient assistance." *United States v. Valencia*, 394 F.2d 352, 355 (5th Cir. 2004). [App. 6]

The Fifth Circuit Court of Appeals' decision is also in conflict with this Court's prior decisions in *Bailey v. United States*, 516 U.S. 137 (1995) and *Staples v. United States*, 511 U.S. 600 (1994), which require a plain reading of a statute and prohibit rendering terms as surplusage. Additionally, the Fifth Circuit's decision to imply scienter to 7 U.S.C. § 13(a)(2) pursuant to this Court's opinions in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994) and *Dennis v. United States,* 341 U.S. 494 (1951) ignores

the scienter expressly provided, essentially rewriting the statute.

As Justice Scalia stated recently: "Congress 'says in a statute what it means and means in a statute what it says there.'"[1] Put simply, if Congress had intended to require "knowingly false" or "knowingly misleading" it would have included those modifiers in the statute or excluded it before "inaccurate."

The Fifth Circuit Court of Appeals' rewriting of 7 U.S.C. § 13(a)(2) violates Article I § 1 of the United States Constitution, is in conflict with the numerous prior decisions of this Court mentioned above, and decides an important question of federal law that has not been, but should be, settled by this Court.

CONCLUSION

This Court should grant review on Certiorari because the Fifth Circuit Court of Appeals decided an important federal question in a way that conflicts with previous rulings of this Court. Additionally, the Commodity Exchange Act is unconstitutional on grounds which the Fifth Circuit Court of Appeals wholly failed to consider. The constitutionality of this federal statute, which is for the

[1] *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (*citing Connecticut Nat. Bank v. Germaine*, 503 U.S. 249, 254 (1992)).

first time being used to prosecute and incarcerate citizens, should be reviewed by this Court.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS,
For the Fifth Circuit.

No. 03-21217

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

MICHELLE M. VALENCIA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas.

(Filed December 17, 2004)

Before DeMOSS, DENNIS and CLEMENT, Circuit Judges.

DeMOSS, Circuit Judge:

Plaintiff-Appellant United States of America (the "Government") appeals the district court's dismissal of a portion of three counts of a seven-count indictment against Defendant-Appellee Michelle Valencia. The district court held a portion of § 13(a)(2) of the Commodity Exchange Act ("CEA"), 7 U.S.C. § 13(a)(2), unconstitutional as overbroad and severed the offending portion of the statute, permitting the constitutional portions as well as other counts of the indictment to survive Valencia's motion to dismiss. For

the following reasons, we determine that § 13(a)(2) is not unconstitutionally overbroad and therefore REVERSE.

BACKGROUND

Valencia was indicted on January 22, 2003, and is charged in relevant part with the knowing delivery on three occasions of "false and misleading and knowingly inaccurate reports" concerning market information that affected and tended to affect the price of natural gas, a commodity in interstate commerce, in violation of 7 U.S.C. § 13(a)(2). The indictment alleges Valencia was employed by Dynegy Marketing and Trade as a natural gas trader, thereby capable of entering transactions that call for the physical delivery of natural gas at fixed or "index" prices.

According to the indictment, Inside *FERC Gas Market Report* ("*Inside FERC*") is an industry newsletter published on the first day of each month that reports certain index prices. *Inside FERC* calculates its reported index prices using information received from traders during monthly surveys, including the price and volume of fixed price, natural gas trades during a period of time. Electric utilities often purchase natural gas at prices tied to the index prices, and the prices of natural gas contracts are often based on index prices. Thus, traders who report false information to *Inside FERC* tend to affect the price of natural gas by pushing reported index pricing up or down, potentially costing gas and electricity consumers throughout the country considerable sums of money.

The indictment charges that Valencia knowingly reported to *Inside FERC* the volume and price data on natural gas trades that never occurred. The three counts under § 13(a)(2) arose from Valencia's alleged reporting of

multiple fabricated trades, trades she allegedly knew never occurred, on three occasions, in November 2000, January 2001, and February 2001.

Valencia moved to dismiss these counts on multiple grounds, asserting that: (1) § 13(a)(2) is unconstitutional as vague; (2) the statute is unconstitutionally applied to the facts of the indictment; and (3) the statute is unconstitutionally overbroad. The district court granted Valencia's motion, dismissing counts one, two, and three in their entirety. The court rejected Valencia's arguments that § 13(a)(2) is unconstitutionally vague and is unconstitutionally applied to the facts of the indictment. But the court granted the motion as to the overbreadth argument and held that because the statute could not be read to require knowledge that the information was false or misleading without rendering the second use of "knowingly" mere surplusage, the provision lacked the requisite scienter. In other words, the district court read the statute to create a felony for the knowing delivery of a report not known to be false or misleading. The statute, under this reading, would criminalize innocent conduct and infringe upon protected speech, and so the district court held it unconstitutional.

The Government filed a motion to reconsider, and the district court vacated its initial order. Upon reconsideration, the court dismissed only those portions of the indictment charging that Valencia knowingly delivered and caused to be delivered false and misleading reports. The district court permitted the portions of the indictment charging that Valencia knowingly delivered and caused to be delivered knowingly inaccurate reports to survive. The Government appeals this disposition.

DISCUSSION

The district court's interpretation of the constitutionality of a federal statute is a question of law that this Court reviews *de novo*. *United States v. Hebert*, 131 F.3d 514, 525 (5th Cir. 1997). Here, we consider whether a portion of 7 U.S.C. § 13(a)(2) is unconstitutional as lacking the requisite *mens rea*, that is, knowledge that the reported information is false or misleading at the time of the knowing delivery.

Section 13(a)(2) of the CEA reads in relevant part:

> It shall be a felony . . . for:
>
> . . . .
>
> (2) Any person to [1] manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or [2] to corner or attempt to corner any such commodity or [3] *knowingly to deliver or cause to be delivered* for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication *false or misleading or knowingly inaccurate reports* concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce . . .

7 U.S.C. § 13(a)(2) (2001) (emphasis added).[1]

The parties' dispute is limited to the third or "reporting" prong of the subsection and presents the question of

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[1] The district court referred to these three prongs, in order, as the manipulation prong, the cornering prong, and the reporting prong.

whether "knowingly" applies, as a matter of law, to only the delivery or also to the nature of reports as false or misleading. Both parties agree that the second appearance of "knowingly" modifies the inaccuracy of the reports. Valencia argues that a plain reading of the statute reveals that only the delivery be knowing or, in other words, that a felony lies where one knowingly delivers reports that are not known by the deliverer to be false or misleading. Therefore, she argues the statute is overbroad for criminalizing innocent conduct and infringing upon protected speech.

In construing the United States Code our task must begin with the words provided by Congress and the plain meaning of those words. *See Bailey v. United States*, 516 U.S. 137, 144-45 (1995); *Staples v. United States*, 511 U.S. 600, 605 (1994). In so doing, we give effect to the intent of Congress, and "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring). These principles stem from respect afforded to Congress, "which we assume legislates in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991).

The Supreme Court recently reiterated its hesitance to encourage the facial attack to a statute's constitutionality on grounds of overbreadth. *Sabri v. United States*, 124 S. Ct. 1941, 1948-49 (2004). But in this instance, the plain language of the statute permits at least two readings, and the parties each champion one. Valencia echoes the district court and argues that Congress intended to create a felony when one knowingly delivers or causes to be delivered a report that is unknowingly false or misleading. The

Government argues that the term "knowingly," when first used in the reporting prong of the statute, applies to both "deliver" and "false or misleading information" because scienter must be implied in statutes where it is not expressly included. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994); *see also Dennis v. United States*, 341 U.S. 494 (1951) (holding statute with disjunctive use of "knowingly" requires specific intent).

The Government's position is correct. The rule requiring a statute be read to contain an adequate *mens rea* to avoid constitutional infirmity stems both from a canon of construction and Supreme Court precedent.[2]

In *X-Citement Video*, the Supreme Court addressed a similar construction problem and held that the most natural reading of the statute was properly rejected to avoid criminalizing innocent conduct. 513 U.S. at 78. The statute there in question, 18 U.S.C. § 2252(a) (1988 & Supp. V 1994), provided for the punishment of any person who knowingly transported any visual depiction if it involved the use of a minor engaging in sexually explicit conduct and it depicted such conduct. The Court held that the word "knowingly" modified all three portions of the subsection: (1) the transportation (which was undisputed); (2) the age of the performer in the visual depiction; and (3) the "sexually explicit nature of the material." *X-Citement Video*, 513 U.S. at 68, 78. Relying primarily on *Morissette v. United States*, 342 U.S. 246 (1952), and *Staples*, 511 U.S. 600 (1994), the majority stated: "the presumption in

[2] Although both parties additionally argue that the legislative history supports their respective positions, we find no salient assistance from those records and instead rely upon case law and principles of statutory construction to reach this result.

favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *X-Citement Video*, 512 U.S. at 72.

Before the Supreme Court decided *X-Citement Video*, a panel of this Circuit, in *United States v. Wallington*, 889 F.2d 573 (5th Cir. 1989), addressed the constitutionality of a statute penalizing information disclosure by government employees. The panel concluded that a construction of the statute saved it from constitutional infirmity, despite the reality that a plain reading might apply to a wide array of innocent conduct. *Id.* at 576-79. Thus, this Circuit has previously interpreted a potentially overbroad statute narrowly and "read an implicit *mens rea* requirement" into a criminal statute that is silent on the subject. *Id.* at 577-78.

Wallington does not, though, pointedly control the result in this case because § 13(a)(2) is not silent on the matter of the *mens rea* element but instead provides an explicit knowing requirement as to delivery and inaccuracy. Valencia argues, echoing the district court's reasoning, that this difference distinguishes *Wallington* and *X-Citement* and requires that § 13(a)(2) be held unconstitutional, at least as to a felony grounded in the knowing delivery of false or misleading reports. Valencia argues that, under *Bailey*, 516 U.S. at 145, and *United States v. Ceballos-Torres*, 218 F.3d 409 (5th Cir. 2000), we must give meaning to each word in the statute and render none superfluous. Valencia argues this cannot be accomplished by reading a scienter requirement into the false or misleading nature of the reports because to do so renders superfluous the word "knowingly" that Congress expressly provided as modifying the inaccuracy of reports. We disagree.

Because *X-Citement Video* elevates a canon of statutory construction to a rule of law, 512 U.S. at 81 (Scalia, J., dissenting), we are guided by precedent in reading the first "knowingly" of § 13(a)(2) to modify both "false" and "misleading," as well as delivery. Scienter applies, even where none explicitly is provided. "The presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269 (2000) (citing *X-Citement Video*, 512 U.S. at 72).

Thus, this Court ultimately rejects one natural grammatical reading of the statute – the reading adopted by the district court that requires knowing delivery but not knowledge of the falsity or misleading character of the reports. Instead, we favor a construction of the statute that avoids criminalizing innocent conduct.

CONCLUSION

Although a natural reading of § 13(a)(2) is consistent with the district court's determination that the reporting prong of the statute is overbroad and criminalizes innocent conduct, Supreme Court precedent mandates that the statute be read narrowly in order to prevent that outcome. Accordingly, we hold the knowledge requirement of the reporting prong of § 13(a)(2) applies to the false or misleading character of the reports, as well as to delivery and inaccuracy. The cause is REMANDED to the district court for further proceedings.

REVERSED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, Plaintiff,	§	CRIMINAL ACTION NO. H-03-024
v.	§	
MICHELLE VALENCIA, Defendant.	§	

MEMORANDUM AND ORDER

(Filed Nov. 13, 2003)

By Memorandum and Order entered August 26, 2003 [Doc. # 57] ("Order"), this Court dismissed Counts One, Two and Three of the January 22, 2003 Indictment against Defendant Michelle Valencia on the grounds that § 13(a)(2) of the Commodities Exchange Act ("CEA") is unconstitutionally overbroad.[1] This matter is now before the Court on Valencia's Motion to Reconsider the Court's

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[1] Section 13(a)(2) of the CEA reads as follows:

It shall be a felony . . . for:

Any person [i] to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or [ii] to corner or attempt to corner any such commodity or [iii] knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce. . . .

7 U.S.C. § 13(a)(2) (emphasis added). Valencia is charged under the third prong of this statute.

denial of her Motion to Dismiss Due to an Incorrect Application of 7 U.S.C. § 13(a)(2) [Doc. # 68], and her Motion to Reconsider the Court's denial of her Motion to Dismiss Counts One, Two and Three and to Declare § 13(a)(2) unconstitutionally vague [Doc. # 69].[2] Also before the Court is the Government's Motion to Reconsider the Court's dismissal of Counts One, Two and Three on the grounds that § 13(a)(2) is unconstitutionally overbroad [Doc. # 63].[3] Valencia has also moved for clarification of Counts Four through Seven of the Indictment [Doc. # 64], which the Government has provided. [Doc. # 73] (under seal). Having considered the parties' submissions, all matters record, and applicable legal authorities, the Court concludes that Valencia's motions to reconsider should be **denied**, and the Government's motion to reconsider should be **granted in part**. This Court's Order dismissing all of Counts One, Two and Three of the Indictment is **vacated**, Counts One, Two, and Three are **dismissed** except to the extent they charge Valencia with the knowing delivery of knowingly inaccurate information, which aspect of Counts One, Two, and Three remain pending for trial.

I. VALENCIA'S MOTION TO RECONSIDER RULING ON INCORRECT APPLICATION OF 7 U.S.C. § 13(a)(2)

The Parties' Contentions. – Valencia argues that the Court erred in its August 26, 2003 Order by holding that conduct proscribed by § 13(a)(2)'s reporting prong is

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[2] *See also* Government's Consolidated Response [Doc. # 70].

[3] *See also* Valencia's Response [Doc. # 71], and Government's Reply [Doc. # 74].

unaffected by § 2(h) of the CEA.[4] As she did in her Motion to Dismiss, Valencia argues she meets the requirements for the § 2(h) exemption from CEA coverage. Valencia points out that § 2(h), titled "Legal Certainty for Certain Transactions in Exempt Commodities," provides an exemption from the CEA for exempt commodities (including natural gas) that are (1) entered into by eligible contract participants and (2) are not entered into on a trading facility. *See* 7 U.S.C. § 2(h)(1)(A) and (B).[5] Valencia contends that as an agent of Dynegy Marketing and Trade. ("Dynegy"), she acted as an eligible contract participant. She also asserts that the trades she reported were not entered into on a trading facility, and thus her conduct meets the requirements for the exception of § 2(h)(1)(A) and (B). Valencia also argues that, although § 2(h) contains predicate language making it applicable only to any "agreement, contract, or transaction in an exempt commodity," she nonetheless is covered by the exemption because § 4(c) of the CEA "authorizes the Commodifies Futures Trading Commission to exempt any agreement, contract or transaction, (*including any person or class of persons offering, entering into, rendering advice or rendering other services with respect to the agreement, contract or transaction*) from any provisions of the [CEA]" and she fits the category of persons described in the above parenthetical.[6]

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[4] *See* Order [Doc. # 57], at 20-23.

[5] Section 2(h)(2)(C) of the CEA provides an express exception to the exemption created by § 2(h) for violations of the manipulation prong of § 13(a)(2). Because Valencia was not indicted under the manipulation prong, the effect of § 2(h) on that prong of § 13(a)(2) is not at issue here.

[6] Valencia's Incorrect Application Motion, ¶ 2 (emphasis in original).

The Government contends that the Court correctly framed the issue as "what effect, if any, § 2(h) has on § 13(a)(2) for conduct that is not a contract."[7] The Government argues the Court correctly found that § 13(a)(2) addresses a broader range of conduct than simply commodity transactions or contracts, and thus the Court correctly concluded that "conduct proscribed by § 13(a)(2)'s reporting prong is unaffected by § 2(h)."[8] The Government argues that even accepting Valencia's contention that the exemption applies also to any person rendering services with respect to a contract, Valencia's conduct in issue, *i.e.*, the reporting of fictitious trades, did not involve services related to a contract in an exempt commodity.

The Court's Conclusions – Valencia's argument that § 13(a)(2) does not apply to her conduct by virtue of § 2(h) is inapposite to the facts of this case. This case is not about actual trades in an exempt commodity entered into by Valencia on behalf of Dynegy. The Indictment charges Valencia with reporting volume and price date for numerous trades of natural gas when Valencia knew that none of the reported trades actually occurred.[9] Valencia's conduct in reporting fictious transactions that never took place does not constitute "offering, entering into, rendering advice or rendering other services with respect to the agreement, contract or transaction in an exempt commodity," as this clause is used in § 4(c) of the CEA. The Indictment correctly applies the reporting prong of § 13(a)(2) to Valencia's conduct, and Valencia's Motion to Reconsider is denied.

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[7] Order, at 22.

[8] *Id.*

[9] Indictment, at 2-4.

II. VALENCIA'S MOTION TO RECONSIDER RULING ON UNCONSTITUTIONAL VAGUENESS

The Parties' Contentions. – Valencia contends that the Court's ruling that the phrase "market information" in § 13(a)(2) is not unconstitutionally vague and refers to all markets[10] fails to consider that the CEA specifically uses the modifiers "cash" or "spot" when it refers to those markets. Thus, a more accurate reading, Valencia argues, is that the CEA uses the term "market" to refer to all types of *futures* markets. In support of this argument. Valencia cites § 2(a)(1)(A), which sets forth the jurisdiction of the CFTC. Valencia asserts that although the CFTC's jurisdiction is limited to futures markets, § 2(a)(1)(A) uses the unmodified term "market."

The Government contends that Valencia's argument simply confirms that Congress knew how to exclude "cash" or "spot" markets from the scope of § 13(a)(2) if it intended to do so. Moreover, Valencia's conduct is prohibited under any definition of "market information."[11]

The Court's Conclusions. – The Court declines to reconsider its decision that the phrase "market information" does not render the statute unconstitutionally vague. The phrase itself is broad, and may refer to information pertaining to cash, spot, or futures markets. The phrase "market information" is not vague as used in § 13(a)(2) because it is limited by another phrase that requires the information to affect or tend to affect the price of a commodity in

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[10] *See* Order, at 25-34.

[11] The Government argues also that Valencia has shown no more than a speculative danger of arbitrary enforcement.

interstate commerce. The CEA's use elsewhere of "cash" and "spot" to describe those markets and the statute's use of the unmodified term "market" in § 2(a)(1)(A) confirm that Congress intended the term "market" to be broad. Valencia's arguments do not alter the Court's conclusion about the meaning of § 13(a)(2), and her Motion to Reconsider on this basis is denied.

III. GOVERNMENT'S MOTION TO RECONSIDER RULING ON OVERBREADTH

The Court concluded in its Memorandum and Order that § 13(a)(2) is unconstitutionally overbroad because it does not require the accused to have knowledge that the reported information was false or misleading.[12] The Court's decision is based on well-established rules of statutory construction warning against rendering statutory language surplusage, and instructing that Congress is presumed to intend each of the terms it used in the statute to have a particular, non-superfluous meaning.

The Parties' Contentions. – The Government argues that rules of statutory construction are not mandatory, citing *Chickasaw Nation v. United States*, 534 U.S. 84, 92 (2001). The Government contends that the legislative history of § 13(a)(2) makes it clear that Congress intended to include the requisite *mens rea* and thus the Court should not rely on canons of statutory construction to determine the meaning of the statute.[13] In addition, the

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[12] *See* Order, at 42-51.

[13] The Government provides a lengthy legislative history. In brief, the Government relies on Congress's insertion of the modifier "knowingly" to describe "inaccurate information" in the original 1922 version of the statute, and the 1968 upgrade of the penalty under the statute

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Government reargues its position that the modifier "knowingly" applies to both "deliver" and "false or misleading information" because *scienter* must be implied in statutes where it is not expressly included. *Dennis v. United States*, 341 U.S. 494 (1951); *United States v. Rodriguez-Rios*, 14 F.3d 1040, 1044 (5th Cir. 1994); *Carter v. United States*, 530 U.S. 255, 267 n.6 (2000). Such a construction is consistent with the maxim that statutes should be saved from constitutional infirmity if such construction is fairly possible. *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780 (1981); *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289, 299 (2001). Finally, the Government points out that one court has read § 13(a)(2) as requiring proof that the defendant knew the information was false of [sic] misleading. *See Utesch v. Dittmer*, 947 F.2d 321, 328 (8th Cir. 1991) (stating "[t]he evidence upon which the plaintiffs rely is insufficient to show that Dittmer's investment recommendations and other statements he made regarding the October futures cattle market were false, misleading or inaccurate, or that he knew or believed them to be so when he made them").

Alternatively, the Government asks that if the Court rejects reconsideration, that the Court strike down only the part of § 13(a)(2) that is unconstitutional and leave the rest intact.[14] If the Court adopts this alternative, Counts One, Two and Three of the indictment need not be dismissed because the statute's prohibition against the

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from a misdemeanor to a felony which resulted in the elimination of the term "carelessly" as a modifier of the verb "deliver." During the debate before enactment of the 1968 amendment, Congress discussed and heard testimony regarding the required *mens rea* for a felony statute. *See* Government's Motion, at 8-20.

[14] Government's Motion, at 2 n.1.

knowing delivery of knowingly inaccurate information is not unconstitutional and is covered by the Indictment.

Valencia argues that the Government's position requires the Court to Ignore long-standing canons of statutory construction that caution against rendering statutory language surplusage. *See Bailey v. United States*, 516 U.S. 137, 145 (1995); *United States v. Ceballos-Torres*, 218 F.3d 409, 412 (5th Cir. 2000); *United States v. Rayo-Valdez*, 302 F.2d 314, 318 (5th Cir. 2002); *Kashanchi v. Texas Commerce-Texas Commerce Med. Bank N.A.*, 703 F.2d 936, 939 (5th Cir. 1983). Valencia argues that *Chickasaw Nation v. United States*, relied upon by the Government, is distinct from the instant case because here the term "knowingly" before inaccurate was not a mistake or drafting error, as appeared to be the case in *Chickasaw*, but a conscious decision by Congress. Valencia further contends that the legislative history does not support the Government's position. The 1968 amendment deleting "carelessly" does not support an assumption that Congress at the same time meant to include a "knowingly" modifier before the terms false and misleading. The legislative history nowhere reflects any intention to include such a requirement, and only sheds light on the desire to raise the offense from a misdemeanor to a felony. Valencia also disputes the Government's interpretation of *Utesch* on the grounds that the defendant in *Utesch* challenged the sufficiency of the evidence, not the constitutionality of the statute.

In addition, Valencia resurrects her argument that the statute is also overbroad because it does not require an intent to manipulate the market. Finally, Valencia contends that the Government's alternative argument to strike

only part of the statute is not proper on reconsideration and is really a request for permission to re-indict Valencia.

The Court's Conclusion. – The Court is not persuaded by the Government's argument that the legislative history of § 13(a)(2) permits the Court to overlook the plain language of the statute. The legislative history cited by the Government does not support the conclusion the Government urges regarding Congressional intent; it only supports a finding that Congress was aware of the requirement for some *mens rea*, and thus deleted the "carelessly" option from the statute when it elevated the crime to a felony. Unlike *Chickasaw*,[15] the legislative history here is muddy at best and does not provide a clear indication of Congressional intent. The specific issue at hand, whether

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[15] *Chichasaw* involved a statute that made certain provisions of the federal tax code concerning reporting or withholding of taxes (including certain listed sections and chapter 35 of the code) applicable to Indian gambling operations. Chapter 35 of the tax code has nothing to do with reporting or withholding of taxes, but imposes excise taxes and occupational taxes related to gambling. 534 U.S. at 87. The plaintiff Indian Tribes argued based on the statute that they were exempt from chapter 35 taxes. A previous version of the statute at issue applied to provisions concerning taxation as well as reporting and withholding of taxes. Once Congress intentionally limited application of the statute to only reporting and withholding, it made no sense to leave chapter 35 in the parenthetical list of provisions concerning reporting or withholding. The Court concluded that the "Tribes' interpretation would read back into the Act the very word "taxation" that the Senate committee deleted. "We ordinarily will not assume that Congress intended 'to enact statutory language that it has earlier discarded in favor of other language.'" *Id.* at 93 (citations omitted). This was particularly true where the questionable language appears in a parenthetical, which should not be allowed to overcome the operative terms of the statute. *Id.* at 94-95. The *Chichasaw* Court determined that it was not "fairly possible" to interpret the statute other than to hold that the failure to delete the reference to chapter 35 in the parenthetical was a mere "drafting mistake" and surplusage *Id.* at 91.

the defendant must know the information is false or misleading, was not discussed in any way in the extensive legislative history discussed by the Government. Thus, it is appropriate for the Court, to rely on basic canons of statutory construction and the plain meaning of the statute.

The Court agrees with Valencia that the Government overstates the holding of *Utesch*. Indeed, *Utesch*, a civil case that does not address the constitutionality of criminal sanctions under § 13(a)(2), does not support the Government's position. The Eighth Circuit held in *Utesch* that there was insufficient evidence to support a finding that the defendant delivered false, misleading, or inaccurate information, *or* that he knew **or** believed the information to be so. *Utesch*, 947 F.2d at 328. There is no holding in *Utesch* that the statute requires a finding that the defendant knew or believed the information was false, misleading, or inaccurate. The district court did not instruct the jury that such knowledge was necessary, and there was no finding of error in that instruction.[16] Thus, it appears that *Utesch* actually supports this Court's interpretation of the statute.

The Court declines to reconsider its ruling that § 13(a)(2) is constitutionally overbroad.[17] However, the

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[16] "The district court charged the jury that to recover on their false reporting claim, the plaintiff[s] were required to show that the defendants knowingly delivered, or caused to be delivered, 'false or misleading or knowingly inaccurate reports regarding the live cattle or live cattle futures market,' and that these reports 'affected the price of October 1979 live cattle futures." *Utesch*, 947 F.2d at 328.

[17] The Court rejects Valencia's argument that the statute is also overbroad because it does not require intent to manipulate the market. As the Government has pointed out, the First Amendment does not

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Government's alternative argument, relegated to a footnote, is persuasive. The Supreme Court has held that "if the federal statute is not subject to a narrowing construction and is impermissibly overbroad, it nevertheless should not be stricken down on its face; if it is severable, only the unconstitutional portion is to be invalidated." *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982) (citing *United States v. Thirty-seven, Photographs*, 402 U.S. 363 (1971)). The Fifth Circuit applied this rule in *Koog v. United States*, 79 F.3d 452 (5th Cir. 1996), which involved duties imposed by interim provisions of the Brady Act upon local law enforcement officers. The Fifth Circuit found that certain of the interim provisions of the Brady Act violated the Tenth Amendment because they forced the States to act as subordinate agents of the federal government. *Id.* at 462. However, the Fifth Circuit found the unconstitutional provisions severable from the remainder of the statute. The *Koog* Court stated that in making a severability determination, the issue is "whether the statute will function in a manner consistent with the intent of Congress." *Id.* (citation omitted). "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Id.* (citation omitted).

In this case, there is no indication that Congress did not intend each one of the three ways in which the statute at issue could be violated, *i.e.*, the knowing delivery of (1)

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protect intentional falsehoods or lies. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). Intentional manipulation of the market is a separate offense addressed in another prong of § 13(a)(2). The statute is not overbroad on the additional grounds Valencia proposes.

false, (2) misleading, or (3) knowingly inaccurate information, to stand on its own. In fact, Congress expressed the opposite intent by including in the CEA § 17, which provides: "If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and of the application of such provision to other persons and circumstances shall not be affected thereby." 7 U.S.C. § 17; *See Koog*, 79 F.3d at 462 (holding "[w]here Congress itself has provided the answer to the question of severability . . . by including such a provision in the legislation, a presumption of severability arises").

Valencia has presented no evidence or authority that overcomes the presumption in favor of severability. Valencia's only retort to the Government's severability argument is that the Government's suggestion is really an attempt to re-indict Valencia. Valencia's argument is without merit. The indictment clearly includes the offense of knowing delivery of knowingly inaccurate information. Because this portion of the reporting prong of § 13(a)(2) is severable from unconstitutional portion of the statute, Counts One, Two and Three may proceed on that basis.

IV. VALENCIA'S MOTION TO CLARIFY COUNTS FOUR THROUGH SEVEN OF THE INDICTMENT

Valencia seeks an order directing the Government to clarify the Indictment. Counts Four through Seven allege that Valencia "devised a scheme or artifice to defraud and for obtaining money and property by means of material, false and fraudulent pretenses, representations and promises." While the indictment specifies what the false and fraudulent pretenses, representations and promises

were, it does not say what party or parties were intended to be harmed by the alleged scheme. The Indictment says that "traders who reported false information to *Inside FERC* tended to affect the price of natural gas by pushing *Inside FERC's* index prices *up or down* which potentially *costs consumers of electricity and natural gas throughout the country great sums of money.*"[18] Valencia asks that the Government be ordered to specify whether Valencia is accused of influencing the price up or down in each count, and to specify if Valencia is accused of a scheme to defraud "consumers of electricity and natural gas throughout the country."

The Government, in a sealed Response [Doc. # 73], has substantially responded to these issues. Thus, Valencia's request for a Court Order is moot.

V. CONCLUSION AND ORDER

The Court will not reconsider its rulings that CEA § 2(h) does not affect the reporting prong of § 13(a)(2), that the phrase "market information" in § 13(a)(2) is not unconstitutionally vague, and that § 13(a)(2) is unconstitutionally overbroad because it does not require knowledge that reported information is false or misleading, However, the Court concludes that the unconstitutional portion of § 13(a)(2) is severable from the remainder of that section, and those portions of Counts One, Two, and Three of the Indictment charging that Valencia "knowingly deliver[ed] . . . knowingly inaccurate" reports remain pending for trial. Valencia's Motion to Clarify Counts Four through

[18] Indictment, at 2, ¶ 7 (emphasis added in Valencia's Motion, ¶ 2)

Seven of the Indictment is moot in light of the Government's Response. It is therefore

ORDERED that Valencia's Motion to Reconsider Defendant's Motion to Dismiss Counts One, Two and Three of the Indictment Due to an Incorrect Application of Title 7, U.S.C. § 13(a)(2) [Doc. # 68] is **DENIED**. It is further

ORDERED that Valencia's Motion to Reconsider Defendant's Motion to Dismiss Counts One, Two and Three of the Indictment and to Declare Title 7 U.S.C. § 13(a)(2) Unconstitutionally Vague [Doc. # 69] is **DENIED**. It is further

ORDERED that the United States' Motion to Reconsider This Court's Order Granting In Part Valencia's Overbreadth Motion and Dismissing Counts One, Two and Three of the Indictment [Doc. # 63] is **DENIED IN PART AND GRANTED IN PART**. It is further

ORDERED that this Court's August 26, 2003 Memorandum and Order [Doc. # 57] is **VACATED IN LIMITED PART** as follows: The Court's dismissal of Counts One, Two and Three of the Indictment in their entirety is **VACATED**, and the Court instead **DISMISSES** the portions of Counts One, Two and Three of the Indictment charging that Valencia "did knowingly deliver and cause to be delivered . . . false and misleading" reports. This ruling leaves unaffected the portions of Counts One, Two and Three of the Indictment charging that Valencia "did knowingly deliver and cause to be delivered . . . knowingly inaccurate" reports. All other findings and conclusions in this Court's August 26, 2003 Memorandum and Order [Doc. # 57] remain intact. It is further

ORDERED that Valencia's Motion to Clarify Counts Four Through Seven of the Indictment [Doc. # 64] is **DENIED AS MOOT**.

SINGED at Houston, Texas this 13th day of November 2003.

/s/ Nancy F. Atlas
NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION.

UNITED STATES OF AMERICA	§	CRIMINAL ACTION
	§	NO. H-03-024
v.	§	
MICHELLE VALENCIA.	§	

MEMORANDUM AND ORDER

(Filed Aug. 26, 2003)

This criminal case is before the Court on Defendant Michelle Valencia's motions to dismiss three of six counts in the Indictment against her as unconstitutionally vague and overbroad and as an incorrect application of 7 U.S.C. § 13(a)(2).[1] Having considered the parties' submissions, all

[1] Before the Court are Defendant's Motion to Declare Title 7 U.S.C. § 13(a)(2) Unconstitutionally Vague and Motion to Dismiss Counts One, Two and Three of the Indictment ("Vagueness Motion") [Doc. # 25], and Memorandum of Law in support thereof [Doc. # 33]; Motion to Declare Title 7 U.S.C. § 13(a)(2) Unconstitutionally Overbroad, and Motion to Dismiss Counts One, Two and Three of the Indictment ("Overbreadth Motion") [Doc. # 27], and Memorandum of Law in support thereof [Doc. # 34]; Defendant's Motion to Dismiss Counts One, Two and Three of the Indictment Due to an Incorrect Application of Title 7 U.S.C. § 13(a)(2), or, in the Alternative, Request for a Bill of Particulars ("Incorrect Application Motion") [Doc. # 26], and Memorandum of Law in support thereof [Doc. # 32]; United States' Consolidated Response to Motions to Dismiss and to Declare Title 7 U.S.C. § 13(a)(2) Unconstitutional (Docs.# 25, 27); and to Motion to Dismiss for Misapplication of Title 7 U.S.C. § 13(a)(2) or for Bill of Particulars (Doc. # 26) [Doc. # 38]; Defendant's Reply to United States' Consolidated Response [Doc. # 41]; United States' Sur-Reply to Valencia's Reply to the United States' Consolidated Response to Motions to Dismiss or for Bill of Particulars [Doc. # 47]; Defendant's Post-Hearing Memorandum in Support of Defendant's Motions to Dismiss [Doc. # 51]; United States' Response to Post-Hearing Memorandum Filed by Valencia in Support of Motions to

(Continued on following page)

matters of record, and applicable legal authorities, the Court concludes that Defendant's Overbreadth Motion should be **granted in part and denied in part**, and her the other Motions are **denied**.

I. THE FACTS ALLEGED IN THE INDICTMENT

A grand jury indicted Defendant Michelle M. Valencia on three counts of false reporting in violation of 7 U.S.C. § 13(a)(2). The January 22, 2003 Indictment alleges that at all material times natural gas was a commodity that traveled in interstate commerce through a vast network of pipelines that spanned Canada, the United States and Mexico. Valencia was employed by Dynegy Marketing and Trade, a natural gas marketer, in Houston, Texas, as a natural gas trader. Natural gas traders such as Valencia were in the business of buying and selling natural gas for profit. Traders often entered into "physical trades," transactions calling for the physical delivery of natural gas. Physical trades occurred at fixed prices or at "index" prices.

Movements in index prices often affected the size of profits that traders such as Valencia were able to generate. Electric utilities often purchased natural gas at prices tied to index prices. In addition, prices of natural gas contracts were often based on index prices. Certain index prices were published by an industry newsletter called *Inside FERC Gas Market Report* ("*Inside FERC*") on the first day of each month. *Inside FERC* calculated index prices by

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Dismiss [Doc. # 55]. The Court also has received Defendant's June 24, 2003 letter citing additional authorities, and the United States' June 25, 2003 letter in response.

using information it received from traders during monthly surveys. That information included the price and volume of fixed price, physical natural gas trades during a period of time at the end of each month called "bid week."

If false information was reported to *Inside FERC*, that information could affect the price of natural gas in subsequent months by pushing index prices up or down.

The Indictment alleges Valencia knowingly delivered false and misleading and knowingly inaccurate reports to *Inside FERC* that included volume and price data for trades that did not actually occur. Count One is based on a November 30, 2000 report of three trades, Count Two is based on a January 31, 2001 report of thirty-three trades, and Count Three is based on a February 28, 2001 report of seven trades.

Section 13(a)(2), the statute on which Counts One, Two and Three of the Indictment are based, reads as follows:

> It shall be a felony . . . for:
>
> **Any person** [i] **to manipulate** or attempt to manipulate **the price of any commodity in interstate commerce**, or for future delivery on or subject to the rules of any registered entity, or [ii] to corner or attempt to corner any such commodity or [iii] **knowingly to deliver or cause to be delivered** for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication **false or misleading or knowingly inaccurate reports concerning** crop or **market information** or conditions **that affect or tend to affect the price of any commodity in interstate commerce**. . . .

7 U.S.C. § 13(a)(2) (emphasis added). Section 13(a)(2) is found in Chapter 1 of Title 7, which is designated the Commodity Exchange Act ("CEA").[2]

At the Court's request, the parties presented at a hearing on June 25, 2003, background information about natural gas trading, the commodities futures exchange, ways in which natural gas trading may be conducted, and the traditional role of *Inside FERC*.[3] The parties' focus was Valencia's motion that the Indictment incorrectly applies § 13(a)(2) to the facts of this case, but some of the information is helpful to an understanding of the parties' arguments and is included here.[4]

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[2] The CEA originated in 1922 as the Grain Futures Act. In 1936, the legislation was renamed the Commodity Exchange Act. The Commodity Futures Trading Commission ("CFTC") was created in 1974 and given enforcement and oversight powers. In 1992 the Futures Trading Practices Act authorized the CFTC to grant exemptions from most provisions of the CEA and provided legal certainty for the over-the-counter derivatives market. In 2000, the Commodity Futures Modernization Act codified swap exclusions and legal certainty for transactions in exempt commodities, and further provided legal certainty in the markets for certain derivatives and futures transactions.

[3] References to the transcript of the June 25, 2003 hearing are cited as "Tr. at___."

[4] At that hearing, the parties presented expert testimony about the nature of transactions and participants in the physical or spot markets and in the futures market. The parties also provided testimony on the issue of how, if at all, reported "index prices" could actually, practically and/or theoretically affect futures trading. Defendant relied on the testimony of Arthur Gelber, of Gelber & Associates, an advisor and consultant to the natural gas industry. The Government relied on the testimony of Albert Helmig, who served as a member of New York Mercantile Exchange ("NYMEX") from 1985-2000, a member of NYMEX's board of directors from 1991-2000, and the exchange's vice chairman for the last two years of his term.

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It is unnecessary for the Court to recount all the witnesses' testimony. Suffice it to say that there is no dispute that, in general, a fixed gas physical contract is a bilateral agreement agreed between two counter-parties for delivery of a physical commodity of a known volume at a known price, and the term "spot market" is largely synonymous with the "physical market" for natural gas. The spot or physical market is not regulated by the CFTC.

Physical trades of natural gas may occur at a price specified in the contract or at an "index price," which is a published price for natural gas based on the publisher's survey of trades reported to have taken place within roughly the last seven days of the month, called "bid week." Insofar as pertinent to this case, the indices for natural gas trades are reported for transactions at various specified geographic locations in the United States and Canada. Publishers create the index prices from information about physical trades received from traders, which information the publisher weights according to one or more proprietary formulas.

Often, transactions for physical or spot natural gas provide that the price of the gas will be at, or a certain number of cents higher or lower than, a specified published index price, even though at the time of the contract negotiation, the parties do not know what that price will be. These indices embody an historical perspective. *Inside FERC* publishes one of the most well-known indices.

It is improper on a motion to dismiss for the Court to make credibility determinations or weigh the testimony by the parties' experts and the Court has not done so. The Court merely has relied on these witnesses' testimony for background information on matters that are not in dispute.

In addition to physical trades, there may also be financial contracts related to natural gas. The most popular type of financial contract, or transaction, is known as a "swap." A swap arrangement can be for physical exchange of product at different locations or for delivery in different months (an exchange of product), or a purely financial transaction where the parties make a financial agreement but do not agree to delivery of any product. These transactions settle at maturity for payment by one party to another of cash to account for price differentials at the settlement date. In any event, in a swap arrangement generally, the parties do not contemplate physical delivery of the commodity. Swap arrangements are all conducted over-the-counter; there is no centralized market for swaps. Swap transactions are not regulated by the CFTC.

Another type of physical contract is a "forward contract," a bilateral agreement between a buyer and a seller for delivery of a commodity at some time in the future at a negotiated price, not a price set by the NYMEX.

In contrast, futures contracts for commodities take place within regulated futures exchanges, which generally have an open outcry trading pit and are regulated and overseen by the CFTC. Commodity exchanges commonly have clearing facilities as third party intervenors of regulated financial integrity which act as the counterparty for every transaction. Each person who buys a futures contract in a commodity makes a transaction with a financial institution, not with a counter-party buying or selling the commodity. Most natural gas futures are traded over the NYMEX. The exchange requires performance guarantees before the parties can transact business over that exchange, although the requirements can be waived

in appropriate circumstances. All futures contracts for natural gas through the NYMEX are deemed to involve delivery at the Henry Hub in Louisiana. A futures contract is basically a financial instrument (at least until the maturation date of the contract) involving the sale or purchase of a commodity sold at a fixed price specified in dollars and cents. Futures contract prices are established by the amounts that buyers and sellers on an exchange (through brokers or traders on the exchange floor) are willing to pay or receive for the commodity at Henry Hub on a specified date in the future.[5] Valencia contends there are no futures contracts for gas to be delivered in California. There is no "index" for the NYMEX.[6] The parties' experts agree that index prices are a "point of departure" for gas prices in the month of publication. All agree that

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[5] Another type of physical transaction is a "basis transaction" that may be settled as a financial transaction. A basis transaction can take place where a buyer and seller agree directly between each other (not on any exchange) that one will take gas at a particular location and the other will sell at a different location, with the price reflecting "basis points" that essentially are the transportation costs (apparently from Henry Hub to the point of delivery of the physical contract). Basis, as described by Gelber, is "cash minus futures." Tr. at 41. There is a type of "basis transaction" where a person "buy[s] a financial instrument where one of the arms of the transaction is the NYMEX price and the other arm of the transaction, the other price is some sort of index to the NYMEX." Tr. at 40-41. Thus, for off-exchange transactions, prices for natural gas can include a dollar and cents price plus or minus specified "basis points." In any event, a basis transaction is not a futures contract and does not occur on any futures exchange. The basis relationship is 30 days of physical gas compared against 30 days of NYMEX gas. The calculation of basis points is the difference between the two.

[6] Generally, futures transactions take place on a regulated exchange, but Gelber recognized that there are some instances where futures contracts take place "off exchange." On the futures exchange, parties do not get to set their own terms and conditions – the contracts are not negotiated. *Id.*

natural gas is essentially fungible.[7] Futures contracts start trading roughly three years prior to their expiration. The "prompt month" is the most current futures month trading. Futures contracts expire two days prior to the first day of flow, which is generally the first day of the month. The expiration of futures contracts generally overlaps with "bid week," which is the last several days of the month and which is generally the time when physical cash transactions occur.

II. ANALYSIS

A. Valencia's Vagueness Motion

1. Legal Standards

A statute is void for vagueness under the due process clause of the Fifth Amendment if it does not "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *see also Women's Med. Ctr. of Northwest Houston v. Bell*, 248 F.3d 411, 421 (5th Cir. 2001) (stating that "[a] law is unconstitutionally vague if it (1) fails to provide

[7] For instance, natural gas that is obtained in the Appalachian Basin is, for all practical purposes, the same commodity that comes from the Gulf Coast Basin, the Permian Basin, basins in Canada, or anywhere else. It is very difficult to get gas physically from Henry Hub to California. Gelber stated, nevertheless, that the "NYMEX is a fantastic barometer for national natural gas value . . . anywhere in North America. . . . But [it] doesn't really speak in and of itself to the price of gas, let's say, [in] California, because this is price of gas in Louisiana at a certain place at a certain point in time." Tr. at 41.

those targeted by the statute a reasonable opportunity to know what conduct is prohibited, or (2) is so indefinite that it allows arbitrary and discriminatory enforcement"). A statute must provide "fair notice" to citizens as to the conduct it prohibits. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). In order to invalidate a statute on the ground that it fails to sufficiently direct law enforcement, the challenge must do more than assert speculative danger of arbitrary enforcement. *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503 (1982).

Constitutional analysis must necessarily begin with the language of the statute. *United States v. Harris*, 25 F.3d 1275, 1280 (5th Cir. 1994). "If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Atchinson v. Collins*, 288 F.3d 177, 180 (5th Cir. 2002). The meaning or ambiguity of statutory language must be interpreted in context, *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000). However, if the literal reading of a statute would compel an "odd" result inconsistent with the purpose for which the statute was enacted, the court will search for other evidence of congressional intent to lend the statute its proper scope, *United States v. Wallington*, 889 F.2d 573, 576 (5th Cir. 1989).

If a statute is vague, it may still constitutionally be enforced against a defendant where the conduct charged in the indictments is the sort of "hardcore" conduct that would obviously be prohibited under any construction of the statute. *See Dombrowski v. Pfister*, 380 U.S. 479, 491-92 (1965) (holding "it is readily apparent that abstention serves no legitimate purpose where a statute regulating

speech is properly attacked on its face, and where, as here, the conduct charged in the indictments is not within the reach of an acceptable limiting construction readily to be anticipated as the result of a single criminal prosecution and is not the sort of 'hardcore' conduct that would obviously be prohibited under any construction").

2. Valencia's Contentions

Valencia relies on legislative history that indicates that Congress intended to exclude "spot" transactions from regulation by the CEA to support her position that § 13(a)(2) is void for vagueness under the Fifth Amendment to the United States Constitution. Valencia argues that natural gas is designated by the CFTC to be an "exempt" commodity[8] and thus subject only to CEA provisions that prohibit manipulation of the market price for any commodity in interstate commerce. Further, Valencia interprets the statute to require manipulation of futures prices, not just prices in the market at large for natural gas.

In this case, although natural gas is traded on the NYMEX, Valencia contends there are no futures contracts for gas deliverable to West Coast locations traded on any exchange. Valencia argues that the Government's interpretation of the statute makes it applicable to any goods capable of being traded on a futures market, even if not currently traded on a futures market, and that, under this

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[8] An "exempt commodity" is any commodity that is not an "excluded commodity" or an "agricultural commodity," 7 U.S.C. § 1a(14). An "excluded commodity," defined in 7 U.S.C. § 1a(13), includes things such as interest rates, exchange rates, currency, securities, and certain economic indices and occurrences.

interpretation, nothing is excluded from CFTC oversight and CEA regulation. Valencia contends a better interpretation is that § 13(a)(2) applies to goods currently traded on a futures market, which does not include West Coast natural gas.

Valencia further contends that § 13(a)(2) provides no notice to ordinary citizens that criminal liability extends to persons who are not licensed under the CEA or who do not deal in commodities futures markets. Valencia contends that because the CEA was enacted to regulate individuals in the commodities futures trading arena, the term "any person" in the statute is vague and allows the statute to be interpreted to mean any person who makes a statement about a commodity in interstate commerce, an interpretation that would criminalize conduct beyond that necessary to further the express purpose of the CEA. Valencia asserts that, under the Government's interpretation, a person with no connection to the "market" whatsoever, such as a politician or reporter, could be liable for statements they make that have even minimal affect [sic] on the market. In addition, Valencia contends the term "market information" is vague because it could reasonably be interpreted to mean either information about registered exchanges only or information about private, wholesale markets.

Valencia further argues that the statute is vague in that it could be interpreted to apply to persons who knowingly deliver information that they thought was correct but which turned out to be false or misleading. Because there has been no judicial construction of the terms "false" and "misleading" to exclude unintentionally false or

misleading, Valencia argues, those terms are vague.[9] In addition, Valencia argues that what is "misleading" to one person, may not be misleading to another, and therefore the statute is vague because compliance is measured by the subjective evaluation of information by others, *See Women's Med. Ctr. of Northwest Houston*, 248 F.2d at 422.

Valencia also argues that the ways in which the statute fails to give notice to the public apply equally to the police, and that the statute is vague because it allows police to enforce its provisions in an excessively broad range of circumstances. According to Valencia, this is evidenced by the fact that in its eighty years of existence, the statute has never been applied in a criminal prosecution. Thus, Valencia concludes, the use of § 13(a)(2) in this case is itself evidence that the statute is susceptible to arbitrary enforcement.

In addition, Valencia invokes the "rule of lenity," contending that the above-described infirmities make § 13(a)(2) ambiguous such that the Court should resolve all ambiguities in favor of the defendant and find this case outside the scope of the statute. *See Moskal v. United States*, 498 U.S. 103, 107-08 (1990) (explaining that "rule of lenity" applies where "a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute" (emphasis in original)).

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[9] The Court addresses in this section only whether the terms "false" and "misleading" are vague for lack of judicial or regulatory interpretation. The issues of whether the statute is unconstitutional for lack of a scienter requirement, or because the statute punishes constitutionally protected speech or conduct, will be addressed in connection with Defendant's overbreadth challenge.

3. The Government's Contentions

The Government counters by arguing that § 13(a)(2), by its plain language, is not limited to transactions in futures contracts. Section 13(a)(2) applies to the delivery of false, misleading or knowingly inaccurate market information that affects or tends to affect "the price of commodities in interstate commerce," The term "commodities" includes goods that can be the subject of futures contracts. *See* 7 U.S.C. § 1a(4). Natural gas is a commodity based on this statutory definition, and it is bought and sold on the New York Mercantile Exchange, among other places. So, according to the Government, § 13(a)(2) unambiguously makes it a crime to make a false report of market information that affects or tends to affect the price of natural gas in interstate commerce. This interpretation is consistent with the predecessor statute, The Grain Futures Act, the purpose of which was to prevent and remove "obstructions and burdens upon interstate commerce in grain." P.L. 67-331, Ch. 309 (September 21, 1922). "Interstate commerce" means "commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof . . . " 7 U.S.C. § 1a(22). Thus, a reasonable person who reads the statute would be on notice that the false reporting aspect of the statute applies to conduct relating to any goods that could be the subject of a futures contract.

The Government further disputes Valencia's contention that application of the statute to "any person" renders the statute vague. The term "person" is defined in 7 U.S.C. § 1a(28) as "import[ing] the plural or singular, and includes individuals, associations, partnerships, corporations and trusts." "Any" has an expansive meaning, that is "one or some indiscriminately of whatever kind." *United*

States v. Gonzales, 520 U.S. 1, 5 (1997). Thus, the plain language of the statute is unambiguous in applying to any person, and not just those who deal in futures markets or who are required to be licensed under the CEA. This interpretation is supported by the language of § 13(a)(1), which by its terms is limited to "[a]ny person registered or required to be registered under this chapter." "[W]here Congress include[d] particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *United States v. Saunders*, 318 F.3d 1257, 1264 (11th Cir. 2003) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))). Moreover, the Government contends that the statute contains a scienter requirement that saves it from being unconstitutionally vague as to who is covered.

As to the term "market information," the Government concedes it is not defined in the CEA. However, the Government submits that the common meaning of the term "market information" includes the type of information alleged in the Indictment (*i.e.*, volume and price data for commodities rather than futures contracts). The Government cites *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 215 (9th Cir. 1974), for the proposition that the term "marketing" has been defined as being broader than conduct involving sales, and includes the "aggregate of functions involved in transferring title and in moving goods from producer to consumer." The common meaning of the term "market information," according to the Government, should be interpreted consistently with these common meanings of "marketing." Moreover, the Government argues that whatever ambiguity the term

"market information" may have at the margins, any such uncertainty has little relevance where the defendant's "conduct falls squarely within the 'hardcore' of the statute's proscriptions. . . ." *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973).

4. Discussion on Vagueness

Additional Legal Precedent. – For guidance in making its vagueness determination, the Court looks to precedent in the Supreme Court and the Fifth Circuit in which statutes were declared unconstitutionally vague. The Supreme Court held in *City of Chicago v. Morales* that when a criminal statute is under challenge for vagueness, a two-part void-for-vagueness test is appropriate:

> Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.

527 U.S. at 56; *accord, Ford Motor Co. v. Tex. Dep't Transportation*, 264 F.3d 493, 507 (5th Cir. 2001); *United States v. Escalate*, 239 F.3d 678, 680 (5th Cir. 2001). The Supreme Court in *Morales* held that a Chicago ordinance that prohibited "criminal street gang members" from "loitering" with one another or others in any public place was unconstitutionally vague.[10] 527 U.S. at 45-46. The

[10] The ordinance was enacted because the Chicago City Council had found that criminal street gang activity was responsible for the city's rising murder rate and escalation of other violent crimes, and that the presence of gang members in public places intimidated many law

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ordinance defined "loitering" as "to remain in any one place with no apparent purpose." *Id.* at 47 n.2. The ordinance was defective because the Court could not imagine how any citizen standing in a public place would know whether he or she had any "apparent purpose" in the eyes of law enforcement. *Id.* at 57. The fact that the statute only imposed a sanction on persons who disobeyed an officer's dispersal order did not save the statute because if the loitering were in fact harmless and innocent, the dispersal order itself was an unjustified impairment of liberty. *Id.* at 58. Further, the ordinance was subject to arbitrary enforcement because the "no apparent purpose" standard governing a police officer's decision to issue a dispersal order "is inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene." *Id.* at 62. "This is not an ordinance that 'simply regulates business behavior and contains a scienter requirement.' It is a criminal law that contains no *mens rea* requirement, and infringes on constitutionally protected rights. When vagueness permeates the text of such a law, it is subject to facial attack." *Morales*, 527 U.S. at 55.

The Fifth Circuit struck down a vague Texas statute in *Kramer v. Price*, 712 F.2d 174 (5th Cir. 1983). At issue in

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abiding citizens and created a fear for the safety of persons and property in areas where gang members established control. *Id.* at 46-47. An offense under the ordinance had four predicates. *Id.* at 47. First, the police officer must have reasonably believed that one or more persons in a public place was at that time a "criminal street gang member." *Id.* Second, the persons had to have been "loitering." *Id.* Third, the officer had to have ordered all persons gathered to disperse. *Id.* Fourth, a person had to have disobeyed the officer. *Id.* Any person who disobeyed the officer's order, whether a gang member or not, was guilty of violating the ordinance. *Id.*

Kramer was a Texas Harassment Statute that provided a "person commits an offense if he intentionally" "(1) communicates by telephone or in writing in vulgar, profane, obscene, or indecent language or in a coarse and offensive manner and by this action intentionally, knowingly, or recklessly annoys or alarms the recipient." *Id.* at 176 (quoting TEX. PENAL CODE ANN. § 42.07). The court of appeals held that the terms "annoys" and "alarms" were inherently vague. *Id.* at 178. Texas courts had refused to construe the statute to indicate whose sensibilities must be offended, and the statute made no attempt to specify a standard. *Id.* "In the absence of judicial clarification, enforcement officials, as well as the citizens of Texas, are unable to determine what conduct is prohibited by the statute." *Id.* Thus, the Fifth Circuit found the statute unconstitutional on its face for vagueness. *Id.*

In *Women's Medical Center of Northwest Houston v. Bell*, 248 F.3d 411 (5th Cir. 2001), the Fifth Circuit struck down as unconstitutionally vague regulations requiring licensed abortion providers to "ensure that all patients . . . are cared for in a manner and in an environment that enhances each patient's dignity and respect in full recognition of her individuality"; to ensure that each patient will "receive care in a manner that maintains and enhances her self-esteem and self-worth"; and to provide "quality" care, which the regulations defined as "[t]he degree to which care meets or exceeds the expectations set by the patient." *Id.* at 421-22. The Fifth Circuit found the regulations unconstitutionally vague because they subjected physicians to sanctions not for their own conduct, but based on the subjective expectations or requirements of an individual patient. *Id.* at 422. Thus, the regulations failed to afford fair warning of what conduct was proscribed. *Id.*

With these standards in mind, the Court addresses the specific statute at issue in this case.[11]

Statutory Analysis of § 13(a)(2) – Scope of Exclusions from Coverage. – The Court is persuaded that § 13(a)(2) is not unconstitutionally vague under the standards discussed above. The Government's position that the statute applies to "any person" and not just those licensed by the CFTC is supported by the plain, unambiguous language of the statute and the phrase "any person" is not vague. The term "person" is defined in the CEA as "import[ing] the plural or singular, and includes individuals, associations, partnerships, corporations, and trusts." 7 U.S.C. § 1a(28). In contrast to the unrestricted term "[a]ny person" in § 13(a)(2), Congress restricted § 13(a)(1) to "persons" who are "registered or required to be registered under [the CEA]."[12] This express limitation of the scope of § 13(a)(1) demonstrates that Congress intended the application of § 13(a)(2) to be more broad than § 13(a)(1). This linguistic distinction supports the Government's

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[11] Judge Koeltl of the United States District Court for the Southern District of New York recently applied these standards to find 18 U.S.C. § 2339B, a statute making it unlawful to conspire to provide material support and resources to a foreign terrorist organization ("FTO"), unconstitutional as applied because the defendants were not put on notice that merely using communications equipment was covered by the statute's prohibition against "provision" of communication equipment, nor does the statute give notice as to what behavior constitutes an impermissible "provision of personnel." *See United States v. Sattar*, 2003 WL 21698266, *4-10 (S.D.N.Y. July 22, 2003).

[12] Section 13(a)(1) makes it a felony for "[a]ny person registered or required to be registered under this chapter" to "embezzle, steal, purloin, or with criminal intent convert" a client's property having a value in excess of $100.

interpretation of § 13(a)(2) to cover people who are not registered with or trading on the futures exchanges.

In addition, natural gas, for delivery on the West Coast or otherwise, is a commodity within the coverage of § 13(a)(2). A "commodity" is:

> wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions as provided in section 13-1 of this title, and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in.

7 U.S.C. § 1(a)(4). Valencia does not dispute that natural gas in general is a "commodity," but argues instead that there are no futures contracts for "West Coast gas" and that natural gas is an "exempt commodity." These arguments are rejected. Natural gas is fungible. Tr. at 67-68. Natural gas has been traded on NYMEX since 1990. Tr. at 121. The issue raised by Valencia of whether "West Coast gas" is a commodity "in which contracts for future delivery are presently or in the future dealt in" is a fact question.[13] Any dispute over that fact may be relevant to Valencia's

[13] While futures traders apparently do not buy and sell West Coast natural gas on the NYMEX, there is no evidence that West Coast gas could not in the future be traded on a futures exchange.

guilt, but does not make the statute unconstitutionally vague as a matter of law.

Further, Valencia's contention that § 13(a)(2) does not apply to contracts for delivery of West Coast natural gas (as opposed to futures contracts entered into on a futures exchange) is not supported by the CEA's language. Section 13(a)(2), by its literal terms may be violated three different ways potentially pertinent to this case:

> (i) by manipulating or attempting to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity[14] (the "manipulation prong"), or
>
> (ii) by cornering or attempting to corner any such commodity (the "cornering prong"), or
>
> (iii) by knowingly delivering or causing to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning market information that affect or tend to affect the price of any commodity in interstate commerce . . . (the "reporting prong").[15]

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[14] The section uses the term "registered entity," which is defined in the CEA to include a "contract market," a board of trade and other entities where futures transactions are cleared. *See* 7 U.S.C. § 1a(29). A "contract market" is a board of trade that meets specified criteria. *See* 7 U.S.C. § 7. Transactions in futures contracts must be conducted on a contract market. *See* 7 U.S.C. § 6.

[15] Section 13(a)(2) contains a fourth prong that is not pertinent here and is not addressed.

The manipulation prong of § 13(a)(2) provides that it is a felony to manipulate prices of a commodity "in interstate commerce, or for future delivery on or subject to the rules of any registered entity." The CEA defines "interstate commerce" as commerce "between any State, territory, or possession, or the District of Columbia, and any place outside thereof" or "between points within the same state, territory, or possession, or the District of Columbia, but through any place outside thereof, or within any territory or possession, or the District of Columbia." 7 U.S.C. § 1a(22) (footnote omitted). Thus, Congress clearly intended the term "interstate commerce" to have a meaning distinct from the phrase "for future delivery on or subject to the rules of any registered entity." Congress could have, and presumably would have, added the latter phrase to the reporting prong of § 13(a)(2) if it had intended to limit the offense in that regard. *See United States v. Saunders*, 318 F.3d 1257, 1264 (11th Cir. 2003) ("[W]here Congress includes particular language in one section of a statute but omits is in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Thus, § 13(a)(2) on its face applies to the false reporting of information that tends to affect the price of a commodity in interstate commerce. Natural gas is such a commodity.

The Court turns to Valencia's argument that spot transactions are excluded from the CEA.[16] The Government

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[16] Valencia points to legislative history in which Senator Capper, the sponsor of the original Senate version of the Grain Futures Act, the predecessor to the CEA, explained in 1921:

> The bill does not concern itself at all with the sale or purchase of actual grain, either for present or future delivery. *The entire business of buying and selling the actual grain,*

(Continued on following page)

does not dispute that the CEA is inapplicable to cash or spot transactions, or that natural gas is an "exempt commodity" under the CEA. It is the effect of other limitations on the scope of § 13(a)(2) that is at issue.

The Court first determines the scope of § 13(a)(2). Section 13(a)(2), through its three prongs, prohibits a broad range of conduct: (i) the manipulation of the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of a commodities futures exchange, (ii) the cornering of commodities, and (iii) false reporting of market information that tends to affect prices of commodities in interstate commerce. Section 13(a)(2) thus prohibits conduct involving a futures contract if the contract also fits within one of the prongs of § 13(a)(2), as well as conduct not involving futures contracts if the conduct fits within one of § 13(a)(2)'s prongs. The prohibitions in § 13(a)(2) are broadly written and must be enforced, and Valencia's construction is artificially narrow. Section 13(a)(2) applies as written unless an exemption in the CEA applies.

Valencia argues that an exemption derived from a 1993 CFTC Final Order precludes enforcement of § 13(a)(2) to her conduct. The 1993 CFTC Final Order provides:

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sometimes called 'cash' or 'spot' business is expressly excluded. It deals only with the 'future' or 'pit' transaction in which the transfer of actual grain is not contemplated.

61 Cong. Rec. 4762 (1921) (statement of Sen. Capper) (emphasis added). It is noted that the anti-manipulation provision now appearing in § 13(a)(2) was added to the statute in 1936 and other offenses were included in that provision in the 1968 amendments. Thus, Senator Capper's comments are not probative on the issue before this Court.

> The Commission, pursuant to Section 4(c) of the Act, hereby exempts from all provisions of the Commodity Exchange Act, 7 U.S.C. 1, et seq., except sections 2(a)(1)(B) of the Act and the provisions of sections 6(c), 6(d) and 9(a)(2) of the Act [codified as of U.S.C. § 13(a)(2)], to the extent that these provisions prohibit manipulation of the market price of any commodity in interstate commerce or for future delivery on or subject to the rules of any contract market, the following transactions entered into on or after October 23, 1974: Contracts for the purchase and sale or crude oil, condensates, natural gas, natural gas liquids . . . "

58 F.R. 21286-02, 21294 (1993). In the 2000 amendments to the CEA, Congress adopted and codified that language as 7 U.S.C. § 2(h). Section 2(h) is captioned "Legal certainty for certain transactions in exempt commodities" and eliminates certain transactions from the CEA's coverage. Specifically, §§ 2(h)(1) and (2) together provide generally that "nothing in this chapter shall apply to a contract, agreement, or transaction in an exempt commodity" except "[various] sections [including §] 13(a)(2) of this title, to the extent such sections prohibit manipulation of the market price of any commodity in interstate commerce and the agreement, contract, or transaction would otherwise be subject to such sections." Section 2(h)(1) makes explicit that the CEA generally does not cover a "contract, agreement, or transaction" (collectively, a "contract") in an exempt commodity, such as natural gas, entered into between large, financially responsible entities outside a

trading facility (*i.e.*, a commodities futures exchange).[17] However, § 2(h)(2) limits the exemption; under § 2(h)(2)(C), the exemption in § 2(h)(1) does not apply to the coverage of § 13(a)(2) to the extent the latter section "prohibit[s] manipulation of the market price of any commodity in interstate commerce ***and*** the agreement, contract, or transaction would otherwise be subject to such sections" (emphasis added).[18] The issue presented here is what effect, if any, § 2(h) has on § 13(a)(2) for conduct that is not a contract.

The Court concludes that conduct proscribed by § 13(a)(2)'s reporting prong is unaffected by § 2(h).[19] There

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[17] The exemption from the CEA's coverage established by § 2(h)(1) applies to contracts between "eligible contract participants" entered into outside a "trading facility." These terms are defined in § 1a(12) ("eligible contract participant" is a person or entity acting for its own account meeting specified financial requirements or others defined in the section) and § 1a(33) ("trading facility" means a "group of persons that . . . provides a physical or electronic facility or system in which multiple participants have the ability to execute or trade agreements, contracts, or transactions by accepting bids and offers made by other participants . . . ").

[18] Thus, § 2(h)(2)(C) is an exception to the exemption, and means that § 13(a)(2)'s prohibitions continue to apply to a contract for natural gas entered into by large entities outside a futures exchange if the contract involves "manipulation of the market price of any commodity in interstate commerce" and the contract would otherwise be subject to § 13(a)(2). In addition, contracts for exempt commodities such as natural gas between entitles who are not "eligible contract participants" are not covered by § 2(h)(1)'s exemption.

[19] For these purposes, this prong of § 13(a)(2) prohibits "knowingly delivering . . . for transmission . . . false or misleading . . . reports . . . that affect the price of any commodity in Interstate commerce." In addition, a contract in an exempt commodity that does not "manipulate . . . the price of any commodity" or a contract outside § 13(a)(2)'s proscriptions generally is unaffected by § 2(h)'s exemption.

is nothing vague about this congressional policy decision.[20] The Court's statutory interpretation does not conflict with the express purpose of the CEA, which, in pertinent part, is:

> to deter and prevent price manipulation or any other disruptions to market integrity; to ensure the financial integrity of all transactions subject to this chapter and the avoidance of systemic risk; to protect all market participants from fraudulent or other abusive sales practices and misuses [sic] of customer assets; and to promote, responsible innovation and fair competition among boards of trade, ***other markets*** and market participants.

7 U.S.C. § 5(b) (emphasis added). Nor does this interpretation conflict with Congress's intent to exclude regulation of cash or spot transactions from the Act, because as discussed, § 13(a)(2) addresses a broader range of conduct than simply commodity transactions.

This interpretation of § 2(h) avoids the putative ambiguity in § 13(a)(2) argued by Valencia. Valencia's reading of the CEA's exemption in § 2(h)(1) and the exception to that exemption in § 2(h)(2)(C) ignores the predicate language in § 2(h)(1) confining the entire exemption to *contracts* in exempt commodities. Her argument also fails to appreciate the breadth of § 13(a)(2)'s language prohibiting manipulation and fraud potentially applicable both to contracts and to other conduct. The Court is unpersuaded

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[20] Congress's decision to exclude registered entitles engaging in contracts in exempt commodities from the sanctions of § 13(a)(2), but not individual traders such as Valencia, is a matter of legislative policy that does not alter this Court's analysis.

that there is an ambiguity in § 13(a)(2) and thus the Court need not address Valencia's argument concerning the rule of lenity in this regard.[21]

"False" and "Misleading." – Valencia also argues that the terms "false" and "misleading" are vague as used in § 13(a)(2) of the CEA.[22] The terms false and misleading have meanings in the law and generally in the English language that are commonly understood.[23] "False" means

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[21] "[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *Scheidler v. Nat'l Org. for Women, Inc.*, 123 S. Ct. 1057, 1067-68 (2003) (citations omitted) (holding that petitioners who did not obtain or attempt to obtain property from others could not be guilty of "extortion" under the Hobbs Act). This doctrine is called the "rule of lenity." *See Moskal v. United States*, 498 U.S. 103, 107-08 (1990) (explaining that "rule of lenity" applies where "a reasonable doubt persists about a statute's intended scope even after resort to 'the language and structure, legislative history, and motivating policies' of the statute" (emphasis in original)); *United States v. Phipps*, 319 F.3d 177, 187-88 (5th Cir. 2003) (applying rule of lenity to find that statute making it a crime of violence to use a firearm in the commission of a crime does not authorize multiple convictions for a single use of a single firearm based on multiple predicate offenses). "The rule of lenity is not invoked by a grammatical possibility. It does not apply if the ambiguous reading relied on is an implausible reading of the congressional purpose." *Caron v. United States*, 524 U.S. 308, 316 (1998) (citations omitted).

[22] Whether or not the statute contains a *mens rea* requirement in connection with the false or misleading information is discussed in connection with Valencia's overbreadth challenge in section II.B below.

[23] *United States v. Singleton*, 946 F.2d 23, 24-25 (5th Cir. 1991) ("'It is a fundamental canon of statutory construction . . . that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.' *Perrin v. United States*, 444 U.S. 37, 42 (1979)."); *Perrone v. General Motors Acceptance Corp.*, 232 F.3d 433, 435 (5th Cir. 2000) ("Courts give the words of a statute their 'ordinary, contemporary, common meaning,' absent an indication Congress

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untrue, deceitful, lying, not genuine, inauthentic.[24] BLACK'S LAW DICTIONARY 618 (7th ed. 1999). "Misleading" means delusive, calculated to be misunderstood.[25] *Id.* at 1015. These are terms with ascertainable meanings appreciated by ordinary people. These terms also are used in many criminal statutes. *See, e.g.*, 18 U.S.C. §§ 152 (presenting false claim in bankruptcy proceeding); 1287 (false claims against the United States government); 471 (counterfeiting); 495 (uttering a forced writing to defraud the United States); 1001 (false statements to federal agencies or agents (includes "misleading statements"); 1341 (mail fraud); 1344(2) (bank fraud); 1623 (false statement to the grand jury or court); 7206(1) (false statements on income tax returns). Section 13(a)(2) simply is not a statute which fails to specify any standard of conduct at all, as in *Morales* and *Kramer*. Nor are "false" or "misleading" terms that requires reference to the sensibilities of a particular individual, as in *Women's Medical Center*. The Government at trial will be held to its burden to prove that the information was, in fact, false or misleading.[26]

Intended them to bear some different import." (quoting *Williams v. Taylor*, 529 U.S. 420 (2000)).

[24] Other definitions of "false" include "not true or correct"; "uttering what is untrue; lying"; "not faithful or loyal"; and "tending to deceive or mislead." RANDOM HOUSE WEBSTER'S DICTIONARY 235 (1993).

[25] Other definitions of "mislead" include "to lead in the wrong direction"; "to lead into error, as of conduct." RANDOM HOUSE WEBSTER'S DICTIONARY 422 (1993).

[26] The Government alleges that the information Valencia provided to *Inside FERC* was based on fake trades that never happened. There can be no doubt that information about "fake" trades is "false" or "misleading" under any definition of those terms. Thus, even if those terms were vague on the margins, Valencia's conduct falls within the

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"Market Information." – Valencia also argues that § 13(a)(2) is vague because the phrase "market information" is not defined and thus the statute is ambiguous in this regard. Valencia then deduces that the ambiguity of the term "market information" renders § 13(a)(2) facially void for vagueness and unconstitutionally vague as applied to her, and reasons that the rule of lenity precludes application of this provision in this case.[27] This argument raises a difficult issue but ultimately is not persuasive.

The Court must start with the language of the statute. *See Bailey v. United States*, 516 U.S. 137, 144-45 (1995) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)). The Court "consider[s] not only the bare meaning of the word but also its placement and purpose in the statutory scheme. [T]he meaning of statutory language, plain or not, depends on context." *Bailey*, 516 U.S. at 145 (internal quotations and citations omitted). Section 13(a)(2), to the extent pertinent here, expressly prohibits the delivery of false or misleading reports "concerning . . . market information . . . that affect or tend to affect the price of any commodity in interstate commerce. . . ." It is clear that this provision prohibits the reporting of false information about the futures market if the report affects or tends to affect the price of any commodity in

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"hard core" of conduct prohibited by this element of the offense for which she is indicted. *See Dombrowski*, 380 U.S. at 492.

[27] It is clear that if the statute is interpreted to apply only to information about the futures contract market *per se*, then Valencia's provision of allegedly false information regarding the price and volume of physical trades does not fall within the ambit of the statute. Valencia argues that the Government's interpretation that market information relates to information about physical trades of commodities, at best, readers the statute ambiguous.

interstate commerce. The question presented is what other information § 13(a)(2) encompasses and whether the term "market information" in that section is sufficiently clear to give fair notice to the public and law enforcement that price, volume, date and location information about physical trades of commodities conducted off the commodities futures exchanges is included.

The analysis must begin with the definitions of "market." Black's Law Dictionary contains several broad definitions for the term "market." For instance, "market" is defined as "a place of commercial activity in which goods or services are bought and sold"; "a geographic area or demographic segment considered as a place of demand for particular goods or services"; "the opportunity for buying and selling goods or services; the extent of economic demand"; "a securities or commodities exchange"; "the business of such an exchange; the enterprise of buying and selling securities or commodities"; and "the price at which the buyer and seller of a security or commodity agree." BLACK'S LAW DICTIONARY 982 (7th ed. 1999).[28] The lay definition of "market" is similarly broad: "a place where buyers and sellers convene for trade; a store for the sale of food; a meeting of people for buying and selling; demand for a commodity; a particular group of potential buyers; a region in which goods and services are bought or used. . . ." RANDOM HOUSE WEBSTER'S DICTIONARY 405 (1993). These definitions of "market" run the gamut from physical locations such as a supermarket or open-air farmer's market where goods physically change hands, to physical

[28] Black's Law Dictionary includes defined phrases that incorporate the term "market," such as a "futures market." BLACK'S LAW DICTIONARY 982 (7th ed. 1999).

locations where multilateral contracts for sale of rights to goods or services occur for traders' own or others' accounts (*i.e.*, the commodity futures exchanges), to physical locations where intangible transactions occur regarding transfers of passive investments in business entities (*i.e.*, securities exchanges), to the purely abstract concept of "opportunity" for engaging in transactions for the buying and selling of goods, services and intangibles. These definitions of the word "market" *per se* are expansive but are not merely subjective concepts. The word has different commonly understood meanings depending on the context in which it appears.

Next, the Court considers the two-word term "market information," that appears in § 13(a)(2) to assess if it is facially void for vagueness or unconstitutionally vague as applied in this case. The Court evaluates this phrase in its immediate context and in the broader context of the other provisions of the CEA. *See Food & Drug Admin.*, 529 U.S. at 132-33; *Wallington*, 889 F.2d at 576-77.

The term "market information" in § 13(a)(2) is expressly limited by the requirement that the information affect (or tend to affect) the price of a commodity in interstate commerce. The information thus somehow must relate to the interstate commodities market and refers to the intangible opportunity for buying and selling of goods or services and measures of the extent of economic demand, the business of buying and selling commodities, and the price at which the buyer and seller of a commodity agree. *See* BLACK'S LAW DICTIONARY, at 982. Data on the price, volume, date and place of sale of goods are squarely within typical market information. This conclusion is bolstered by the requirement in § 13(a)(2) that the information about the market must be shown to affect (or tend

to affect) the price of the commodity. Accordingly, when the term market information is considered in its immediate context, it is not so amorphous that vagueness permeates the text of this law making it subject to facial attack. *See City of Chicago v. Morales*, 527 U.S. at 55. There is no indication that this term authorizes or encourages arbitrary or discriminatory enforcement. *Id.*; *see also Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 215 (9th Cir. 1974), (holding in the context of the Capper-Volstead Act[29] that the term "marketing" is broader than conduct involving sales of agricultural products, and includes the "aggregate of functions involved in transferring title and in moving goods from producer to consumer").

This conclusion is consistent with the use of the term "market" in the rest of the CEA. Congress' primary purpose in enacting the CEA (and the predecessor statute) was regulation of the futures trading market, *see, e.g.*, 7 U.S.C. §§ 2, 6, 6a through 12c. The CEA generally employs the word "market" as a noun coupled with another explanatory word. For instance, the CEA refers to organized futures markets as "contract markets." Coverage of the Act, however, is not restricted to futures trading. Congress' findings in support of the enactment are:

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[29] The Capper-Volstead Act of 1922 allowed persons engaged in the production of agricultural products to act together in association "in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce" such products without violating anti-trust laws. *See Treasure Valley*, 497 F.2d at 212 (quoting *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 27-29 (1962)). At issue in *Treasure Valley* was whether trade associations, who did not engage in the actual production or sale of products but assisted in contract negotiations, were covered by the Capper-Volstead Act. *Id.* at 212-15.

> The transactions subject to this chapter are entered into regularly in interstate and international commerce and are affected with a national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financial secure trading facilities.

7 U.S.C. § 5(a). The reference by Congress to management and assumption of price risks appears to relates [sic], at least in part, to risks of commodities trading. Futures contracts are a means to hedge risks associated with large physical commodities transactions.[30] *See generally id.*, § 1a(11)(A) (eligible contract participant is one that (i) has a "demonstrable ability . . . to make or take delivery of the underlying commodity", (ii) incurs risks, in addition to price risk, related to the commodity", (iii) "provides risk management or hedging services to, or engages in market-making activities with, the foregoing entities involving transactions to purchase or sell the commodity . . . or transactions in the commodity").

Congressional interest in protecting markets related to futures contracts covered by the CEA is evidenced further by the Act's reference to "market" or "markets" generally in other contexts, such as "market integrity" and "other markets" in describing the purposes of the Act, *Id.*,

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[30] Defendant does not appear to contest this fact. *See* Tr. at 93 (Gelber testimony that a substantial reason the futures market came into existence was so that parties with positions in the physical market could hedge the risk of price changes).

§ 5(b).[31] Congress prohibited persons convicted of a felony under the CEA from registering with the CFTC and barred such persons from using or participating in any "market regulated by the Commission." *Id.* § 13(b). This modification of the term "market" here suggests that Congress intended the term "market" to have a broader meaning than the futures market. *See also* 7 U.S.C. § 6(a) (making it unlawful, unless certain conditions are met, "for any person to offer to enter into, to enter into, to execute, to confirm the execution of . . . a contract for the purchase or sale of a commodity for future delivery (other than a contract which is made on or subject to the rules of a board of trade, exchange or market located outside the United States, it [sic] territories or possessions)"); *id.* § 6(b) (CEA permits the CFTC to adopt regulations proscribing fraud (and requiring minimum financial standards) and registration by any person in the United States who engages in the offer or sale of any commodities futures contract made "on or subject to the rules of a board of trade, exchange, or market located outside the United States").[32]

Congress also uses the term "market participant" in the CEA without giving a specific definition. The term

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[31] The last clause of § 5(b) describing the purpose of the statute is "to promote responsible innovation and fair competition among boards of trade, *other markets* and market participants." 7 U.S.C. § 5(b).

[32] *See also id.* § 1a(11)(A)(iii) (referring to a dealer who engages in "market-making activities" (emphasis added)); *id.* § 7(b)(2) (requiring a board of trade seeking designation as a contract market to "have the capacity to prevent market manipulation through market surveillance, compliance and enforcement practices . . . " (emphasis added)); Congressional statement of Purposes for Commodities Futures Modernization Act of 2000, reproduced following 7 U.S.C. § 1 ("the purposes of this Act are – . . . (8) to enhance the competitive position of United States financial institutions and financial markets").

appears to refer often to participants in the business of the futures exchanges but is not limited to the narrow class of members of the exchanges. The term also is intended to have a meaning broader than solely participants in the futures transactions because it sometimes is modified by clarifying phrases when intending to limit it to that arena. *See, e.g.*, 7 U.S.C. § 5(b) (in the description of "the purpose of the chapter" the goal to "serve the public interests . . . through a system of effective self-regulation of trading facilities, . . . market participants and market professionals under the oversight of the [CFTC]" with the further goal "to protect all market participants from fraudulent or other abusive sales practices and misuses [*sic*] of customer assets," and "to promote responsible innovation among boards of trade, other markets and market participants" (emphasis added)).[33]

Congress' wording in § 13(b) further evidences its intention that § 13(a)(2) address information about topics other than merely the futures market.[34] Congress also included crimes relating solely to the futures markets in

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[33] It is noted that in § 7, which governs the authorization of boards of trade as "contract markets" authorized to execute futures contracts, the use of the term "market participant" appears to refer principally to a participant in the futures trading through the board. The fact that the term "market participant" and other references to the word "market" in § 7 are focused on the futures trading business is not dispositive of the meaning of the term "market" elsewhere in the CEA. Section 7 addresses solely the requirements for a board of trade to obtain and retain the status of a futures exchange, and provisions on any other topic would be irrelevant and confusing in context.

[34] Section 13(b) provides that a person convicted of a felony under § 13 shall be suspended from registration and denied re-registration for five years and barred from using or participating in any "market regulated by the Commission" for five years or longer.

other provisions of the CEA (such as § 6a (excessive speculation), § 6b (prohibition of fraud, false reporting and deception), and § 6c (prohibited transactions)), in broad terms without restriction to matters regulated by the CFTC or futures contracts executed on the registered exchanges.[35] Limiting § 13(a)(2) as Valencia proposes would make that section largely duplicative of crimes and prohibitions in other sections of the CEA, thereby violating the tenet the Court must assume that Congress intended each of the provisions in a statute to have a particular, non-superfluous meaning. *See United States v. American Library Ass'n, Inc.*, 123 S.Ct. 2297, 2319 (2003); *see also Bailey v. United States*, 516 U.S. 137, 144-46 (1995); *see Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000).

In sum, when Congress used the word "market" other than in defined terms in the CEA, Congress appears not to have intended to restrict the provision to the futures contracts or the regulated futures market, and instead refers to the regulated and unregulated arenas somehow related to those contracts. Where a restriction to the futures market was intended, Congress so indicated by using the term "contract market," some defined term, or some modifying phrase. The Court therefore rejects Valencia's argument that, because the term "market" is limited to markets for futures contracts in some contexts, the term "market information" in § 13(a)(2) is comparably limited.

The Court also concludes that Valencia had sufficient notice from the term "market information," when read in

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[35] This is also true of the cornering prong of § 13(a)(2).

context – "reports concerning . . . market information . . . that affect or tend to affect the price of a commodity" – that reports of entirely fictitious natural gas trades were prohibited by § 13(a)(2). Section 13(a)(2) is not a statute that fails to specify any standard of conduct at all, as in *Morales* and *Kramer*. The statute does not use words dependent on entirely subjective interpretations, such as "annoy" or "alarm." *See Kramer*, 713 F.2d at 178; *see also Morales*, 527 U.S. at 55. The term "market information" in § 13(a)(2) is not subject to arbitrary and discriminatory enforcement because its ordinary meaning in the context is sufficiently discernible to guide law enforcement.[36] In addition, although the term cannot be defined precisely at the outer limits, the proposition that it relates only to futures market information is implausible because of the general interrelationship between the futures market and the commodities markets. The Court concludes that the term "market information" is not ambiguous as applied to Valencia and it is not necessary to invoke the rule of lenity. *See Caron v. United States*, 524 U.S. 308, 316 (1998) (citations omitted); *United States v. Cyprian*, 197 F.3d 736, 739 (5th Cir. 1999).

Finally, as the Government contends, even if the use of "market information" is ill-defined at the margins in the

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[36] The Court also is unpersuaded by Valencia's contention that the lack of prior enforcement of § 13(a)(2) in the precise manner the Government seeks here supports her void for vagueness theory. There are a multitude of reasons that the Government chooses to enforce a statute. The fact that this enforcement is different from earlier prosecutions, particularly with a rarely enforced law such as the CEA, is not suggestive of anything. The novelty of the Government's theory is no basis to conclude that there is constitutionally cognizable confusion as to the scope of the statute.

reporting prong of § 13(a)(2) and thus is vague at its outer limit, Valencia's conduct falls within the "hard core" of the statute. *See Broadrick*, 413 U.S. at 608; *Dombrowski*, 380 U.S. at 491-92. The allegedly false price, volume, date and location information on physical trades of a commodity Valencia provided to the publisher of a widely recognized index on that commodity is "obviously . . . prohibited under any construction" of the term "market information" that allegedly "affects the price of the commodity in interstate commerce."

Therefore, Valencia's Motion to Dismiss on the grounds of vagueness is denied.

B. Valencia's Overbreadth Motion

1. Legal Standards

The statute at issue limits speech. Thus, a First Amendment analysis is necessary. Protections afforded by the First Amendment are not absolute – the Government may regulate certain categories of expression consistent with the Constitution. *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992). An overbroad statute is one that punishes speech that is not constitutionally protected, but includes within its scope protected speech. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *Hill v. City of Houston*, 764 F.2d 1156, 1161 (5th Cir. 1985). "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council of Los Angeles v. Taxpayer for Vincent*, 466 U.S. 789, 800 (1984). Moreover, the chilling effect of an overbroad law does not always justify prohibiting all enforcement of the law, particularly a law that reflects "legitimate state interests in maintaining

comprehensive controls over harmful, constitutionally unprotected conduct." *Virginia v. Hicks*, 123 S.Ct. 2191, 2197 (2003) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

> [T]here are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law 'overbroad,' we have insisted that a law's application to protected speech be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications . . . before applying the 'strong medicine' of overbreadth invalidation.

Id. (emphasis in original).

In order for offensive speech to be illegal, the Government must prove the *mens rea* of the speaker. *See Virginia v. Black*, 2003 WL 1791218 (April 7, 2003) (striking down portion of statute prohibiting burning a cross to intimidate which makes fact of cross burning itself *prima facie* evidence of intent to intimidate). Where intent is not expressed in the statute, "[t]he structure and purpose of the statute [may] demand the inclusion of intent as an element of the crime." *Dennis v. United States*, 341 U.S. 494, 499 (1951); *see also United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994); *Staples v. United States*, 511 U.S. 600 (1994); *Morissette v. United States*, 342 U.S. 246 (1952). Where the statute contains no scienter requirement "it is supplied by the general rule of construction that 'knowledge of the facts constituting the offense is ordinarily implied' where a 'statute does not expressly

mention any mental element.'" *Harris*, 25 F.3d at 1279-80 (citations omitted).

Commercial speech is entitled to less protection than other types of speech and may be regulated to the extent it is false or misleading, but not beyond the scope of the Government's interest. *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469 (1989); *see R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388-89 (1992), and cases cited therein. "It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.' " *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (citations omitted).

A federal statute should be narrowly construed to avoid overbreadth, if the statute is fairly subject to such a limiting construction. *United States v. Wallington*, 889 F.2d 573, 576 (5th Cir. 1989). However, if a statute is genuinely overbroad, the court may strike it down even if the defendant's conduct would be prohibited even under a narrowly tailored statute. *NAACP v. Button*, 371 U.S. 415, 432 (1963).

2. Valencia's Contentions

Valencia argues that § 13(a)(2), as written and as applied in this case, criminalizes innocent conduct because the Government has not alleged any specific intent to manipulate the marketplace by Valencia. She also contends that her confidential responses to an independent publication's survey were legal, protected speech not intended to manipulate the futures market. She contends that because any person who provides false or misleading information regarding anything that could affect or tend to affect the price of any good that could ever be sold for

future delivery could be covered by the statute as written, the statute is overbroad. She posits that § 13(a)(2) could encompass publicly reported comments made by reporters and politicians about commodities, for example. Moreover, Valencia argues that the statute does not require that the defendant knew the information was false or misleading, and thus the statute criminalizes too much speech. Valencia also distinguishes § 13(a)(2) from statutes in which a *mens rea* requirement properly may be implied. Here, the word "knowingly" was used to describe the term "inaccurate," but not the other categories of covered reports *i.e.*, "false and misleading." She contends that the court must assume that Congress intentionally omitted the *mens rea* requirement from the statute's coverage when it comes to "false" and "misleading" reports. Valencia contends that the interpretation the Government seeks exceeds the purpose of the statute, which is to avoid disruption to the futures market.

In addition, Valencia disputes that the speech at issue here is commercial speech. Valencia defines commercial speech as speech which proposes a commercial transaction. *See Posadas de Puerto Rico Assocs. v. Tourism. Co. of Puerto Rico*, 478 U.S. 328, 340 (1986). Even if it is commercial speech, Valencia argues, the statute goes beyond the restrictions necessary to serve its substantial interests. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

3. The Government's Contentions

The Government counters that § 13(a)(2) is not overbroad. The Government argues that a purpose of the CEA generally, and § 13(a)(2) in particular, is prevention of

disruption of the integrity of commodities markets. The Government contends that the statute requires proof both that Valencia knew she was delivering false, misleading or knowingly inaccurate market information, and that such delivery affected or tended to affect the price of a commodity in interstate commerce. Protection against this type of activity furthers the CEA's purpose, in the Government's view.

The Government also contends that the statute contains the *mens rea* requirement "knowingly," that the Indictment tracks that allegation, and that the term "knowingly" does not require specific intent, just proof of knowledge of the facts that constitute the offense. *Byran v. United States*, 524 U.S. 184 (1998); *United States v. Morales*, 272 F.3d 284, 287-89 (5th Cir. 2001). Thus, Defendant, the Government argues, does not need to have the specific intent to manipulate the market to violate § 13(a)(2). Furthermore, the Government argues that knowingly reporting false, misleading or inaccurate market information is not constitutionally protected conduct and accordingly the statute does not require the specific intent to manipulate the market. *See X-Citement Video, Inc.*, 513 U.S. at 72-77; *United States v. Sablan*, 92 F.3d 865, 868 (9th Cir. 1996).

The Government also argues that the type of false, misleading, or inaccurate information covered by the statute is limited to "market information" about commodities, not just any information about goods of any kind, as Valencia contends. The Government points to the statutory definitions of "commodity" and "future delivery," 7 U.S.C. §§ 1a(4), 1a(19), which narrow the scope of goods presently covered by futures contracts and futures contracts that may someday be traded. The Government

urges that there also are practical limitations on what goods can be the subject of futures contracts; the goods must be fungible, the price must be volatile, and there must be a diverse and large number of buyers and sellers.

The Government alternatively argues that Valencia's attempt to limit § 13(a)(2) to conduct that specifically affects the market price of futures contracts – as opposed to the price of the commodities themselves – ignores the plain language of the statute, which applies to the price of the commodity, not the futures price.

The Government also points out that the grand jury has not charged Valencia with violation of the manipulation prong of § 13(a)(2), which prohibits manipulation of the "price of any commodity" "in interstate commerce" or "for future delivery on or subject to the rules of any registered entity. . . . " Valencia is charged with violation of the reporting prong, which does not require – under the statute as drafted – a showing of a direct effect on commodity futures prices. The Government contends that interpreting § 13(a)(2) to apply to the reporting of false market information that "tends to affect" the cash price of a commodity is consistent with the purpose of the CEA because of the integral relationship between the cash and futures price of commodities. The Government points to the CFTC's recognition that disruption of the commodities pricing will disrupt the futures contract markets and vice versa. *See In re Dynegy Mktg. & Trade*, 2002 WL 31835506 (CFTC December 18, 2002); *In re El Paso Merch. Energy, L.P.*, 2003 WL 1539777 (CFTC March 26, 2003).

The Government further contends that the plain language of the statute does not raise First Amendment concerns at all because fraud is not constitutionally

protected conduct. *Schneider v. Town of Irvington, N.J.*, 308 U.S. 147 (1939); *Durgins v. City of East St. Louis, Ill.*, 272 F.3d 841, 843 (7th Cir. 2001).

4. Discussion on Overbreadth Arguments

Commercial Speech. – As an initial matter, the Court must determine whether this case involves commercial speech. Commercial speech is entitled to less protection than other types of speech and may be regulated to the extent it is false or misleading, but regulation may not extend beyond the scope of the Government's interest. *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469 (1989); *see R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388-89 (1992), and cases cited therein. Such speech occupies a "subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). The overbreadth doctrine is inapplicable to commercial speech. *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496-97 (1982).

Commercial speech has been defined by the Supreme Court as speech that proposes a commercial transaction. *Fox*, 492 U.S. at 482; *Posadas de Puerto Rico Ass'n. v. Tourism Co.*, 478 U.S. 328, 340 (1977) (citing *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)). The nature of speech as commercial is not evaluated simply on the basis of whether the speech concerns a commercial subject. *Virginia State Bd. of Pharm.*, 425 U.S. at 761-62 (stating that purely factual matter of public interest may claim First Amendment protection). As the Supreme Court noted in *Fox*, "[s]ome of our most valued forms of fully protected

speech are uttered for a profit." *Id.* The Fifth Circuit has identified three factors that help determine whether speech is commercial: (i) whether the communication is an advertisement; (ii) whether the communication refers to a specific product or service, and (iii) whether the speaker has an economic motivation for the speech. *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 552 (5th Cir. 2001). If all three factors are present, there is "strong support" for the conclusion that the speech is commercial.[37]

Valencia's speech does not meet the first two of the three factors set forth in *Procter & Gamble*. Valencia

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[37] *Procter & Gamble* is based on the Supreme Court's decision in *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-68 (1983). In *Bolger*, the Supreme Court addressed whether certain mailings advertising contraceptives constituted commercial speech. The Court defined the core notion of commercial speech as "speech which does no more than propose a commercial transaction." *Id.* at 66. But noted that certain of the mailings were "informational" and the mere fact that they also were advertisements would not compel the conclusion that they are commercial speech. Also, the reference to a commercial product does not alone render the mailings commercial, nor does the fact that the mailer had an economic motive. *Id.* However, all these factors taken together lead to the characterization of the mailings as commercial speech. "Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." *Id.* at 68. The Supreme Court, citing *Bolger*, has noted that the precise bounds of the category of commercial speech are perhaps subject to doubt, but it undoubtedly includes pure advertising. *Zauderer v. Office of Disc. Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 637 (1985). The focus must be on the 'commonsense' distinction between speech proposing a commercial transaction and other types of speech. *Id.* The Supreme Court faced in *Bolger* and *Zauderer* the issue of what characteristics may take speech relating to a commercial transaction outside the limited protection of commercial speech, but gave no indication that the definition of commercial speech should be broadened to cover speech not related to a commercial transaction at all.

reported statistics relating to prior natural gas transactions. Her speech was not a solicitation to buy, sell or trade. She did not encourage anyone to buy, sell or trade natural gas, nor to buy it from one source rather than another.

More generally, § 13(a)(2)'s reporting prong regulates speech that does not merely propose a commercial transaction. The statute applies to "any person" who makes a false report about market information affecting the price of a commodity. Thus, § 13(a)(2) potentially regulates speech by people not making reports as part of economic transactions at all, such as reporters, politicians, activists and educators. The Court concludes that this case does not involve commercial speech as defined by the Supreme Court. Therefore, the Court conducts a traditional overbreadth analysis under the standards discussed above.[38]

Scienter Requirement of § 13(a)(2)'s Reporting Prong. – In this case, the Court must analyze the reporting prong of § 13(a)(2), which makes it illegal to "***knowingly* deliver** or cause to be delivered for transmission through . . . interstate commerce by telephone . . . or other means of communication **false or misleading or *knowingly* inaccurate reports** concerning market information that affect or tend to affect the price of any commodity in interstate commerce." 7 U.S.C. § 13(a)(2) (all emphasis added). This is not a statute with no *mens rea* requirement at all. It is clear that a person accused of violating this prong of § 13(a)(2) must know he is delivering information

[38] The Court recognizes that if commercial speech were at issue, the four-part test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980), would apply.

through a telephone or some means of communication. As drafted, Congress has included an express knowledge requirement for "inaccurate" reports, but not for "false" or "misleading", reports. The issue is whether under § 13(a)(2), as drafted or interpreted under the canons of statutory construction, the person also must ***know*** that the reported information is "false" or "misleading."[39]

The Government urges the Court to imply a scienter requirement for "false" and "misleading" information, to match Congress' express knowledge requirement for "inaccurate" information. The Government justifies this interpretation by suggesting that the word "knowingly" preceding "to deliver or cause to be delivered" in § 13(a)(2) should be construed to cover the nature of the reports as well as the verb, to deliver. The Government's argument, however, is essentially a request that the Court rewrite the statute. Unlike the statutes in any of the cases cited by the Government or any located by the Court, Congress included an explicit intent requirement for one alternative way that the subsection could be violated – but not the other pertinent two ways.

The Court concludes that Congress' failure to require that a defendant be aware that the information she provided was false or misleading renders the statute overbroad on its face. A literal interpretation of this portion of § 13(a)(2) could subject citizens to strict liability for inadvertently providing false or misleading information. The Government's offer to prove that Valencia knew

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[39] It is clear that contrary to Valencia's arguments, the reporting prong of § 13(a)(2) does not require proof of an intent to manipulate the market. Intentional manipulation of the market is a separate crime set forth in the first prong of § 13(a)(2).

she was delivering false information, as alleged in the Indictment, and its willingness to bear that burden at trial do not save the statute from a facial overbreadth attack. *See Virginia v. Hicks*, 123 S.Ct. 2191, 2196-97 (2003) (an overbroad statute may not be enforced at all "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression" citing *Broadrick*, 413 U.S. at 615); *NAACP v. Button*, 371 U.S. 415, 432 (1963).

The Court cannot infer the Congressional intent as the Government suggests because the Court must assume that Congress intended each of the terms it used in the statute to have a particular, non-superfluous meaning. *Bailey v. United States*, 516 U.S. 137, 144-46 (1995); *see Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). If the Court accepted the Government's argument, then Congress included "knowingly" to modify "to deliver" and reports that were "false" and "misleading," but inexplicably and unnecessarily repeated the knowingly intent requirement in reference to "inaccurate" reports. Were it not for this second "knowingly," this Court likely would agree with the Government.[40] However, as drafted, that statute cannot be construed to require knowledge that the information was false or misleading without rendering the second use of "knowingly" mere surplusage. A basic canon of statutory

[40] *See, e.g., United States v. Rodrigues-Rios*, 14 F.3d 1040, 1044 (5th Cir. 1994) (noting that "although it cannot be discerned immediately from [18 U.S.C. § 1001]," the "knowingly and willfully" requirement contained in the phrase "knowingly and willfully . . . makes any false, fictitious, or fraudulent statements or representations" applies to all three types of conduct).

construction warns against superfluousness. "Judges should hesitate . . . to treat [as surplusage] statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense." *United States v. Ceballos-Torres*, 218 F.3d 409, 412 (5th Cir. 2000) (alteration in original) (citing *Bailey v. United States*, 516 U.S. 137, 145 (1995)). *See also United States v. Rayo-Valdez*, 302 F.3d 314, 318 (5th Cir. 2002) (the court's analysis of whether an offense constitutes a "crime of violence" "reflects the principle that when interpreting a statute, it is necessary to give meaning to all its words and to render none superfluous"); *Kashanchi v. Texas Commerce Med. Bank, N.A.*, 703 F.2d 936, 939 (5th Cir. 1983) (noting "[i]t is a well-established principle of statutory construction that 'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.'" (citation omitted)). This Court cannot ignore the express language of the statute, or rewrite it to pass constitutional muster.[41] Congress "says in a statute what it means and means in a statute what it says there," *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citing *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)). "As we have previously noted in construing another provision . . . , when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its

[41] Congress' inclusion of the word "knowingly" twice (both before the verbs "deliver" or "cause to be delivered" and before the word "inaccurate reports") also suggests that Congress intended not to include that requirement for "knowing and misleading" in § 13(a)(2).

terms." *Id.* (internal quotation marks and citations omitted). There is no rule of statutory construction that justifies the Government's proposed construction. *See Texaco v. Duhe*, 274 F.3d 911, 920 (5th Cir. 2001) (holding that had Congress intended to exclude warranty contracts from the price ceilings of § 105 of the Natural Gas Policy Act, it would have written the section to do so, and stating "no principle of statutory interpretation grants us judicial license simply to rewrite statutory language by ascribing additional, material terms . . . ").[42]

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[42] The Court also is unpersuaded that the facial overbreadth of the reporting prong of § 13(a)(2) can be saved by interpreting the "knowingly" immediately preceding "deliver" to require knowledge that the information would affect or tend to effect the price of a commodity in interstate commerce. The constitutional issue is whether the statute impermissibly criminalizes a substantial amount of protected speech. *Id.*; *see also Carter v. United States*, 530 U.S. 255, 268 (2000) (holding that the presumption in favor of scienter requires a court to read into a statute only that *mens rea* that is necessary to separate wrongful conduct from otherwise innocent conduct"). *Liparota v. United States*, 471 U.S. 419 (1985), in which the Supreme Court addressed a federal statute governing food stamp fraud that provides that "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations" is subject to a fine and imprisonment, does not apply here. *Id.* at 420. In that case, based on the specific the [sic] wording of the statute in issue, the Supreme Court found "[a]bsent indication of contrary purpose in the language or legislative history of the statute, we believe that [the statute] requires a showing that the defendant knew his conduct to be unauthorized by statute or regulations." *Id.* at 425. *Liparota* thus stands for the proposition that a criminal statute should be interpreted to require that the Government prove that the defendant intend to do the act that the statute is intended to prohibit. Even if, under *Liparota*, the knowledge requirement extends to include knowledge that the information would have an effect on a commodity's price, without more, does not cure the overbreadth; the statute would still impermissibly punish innocent conduct, the reporting of information the defendant erroneously thought was truthful. In order to save

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While the Court hesitates to declare a congressional enactment unconstitutional, here it must do so. "[T]he duty to avoid constitutional questions is not a license to rewrite the statute." *Atchison v. Collins*, 288 F.3d 177, 181 (5th Cir. 2002).

The Government relies on *Dennis* and *Wellington*, but these decisions do not support the result the Government urges. In *Dennis*, the statute at issue omitted a knowledge requirement from one subsection, while expressly including such a requirement in two other subsections. In *Dennis*, the Supreme Court affirmed the Second Circuit's interpretation of 18 U.S.C. § 2385, the Smith Act, which makes it unlawful to knowingly advocate the overthrow of the government. 341 U.S. at 496. Section 2(a)(1) of the statute expressly includes a "knowingly and willfully" element, but § 2(a)(3) omits the "knowingly and willfully" language. *Id.* at 499. The Supreme Court found that the "structure and purpose of the statute demand the inclusion of intent as an element of the crime." *Id.* In implying an intent element in *Dennis*, the Supreme Court was not faced with the choice between a statutory construction that would render a particular word or element of the subsection meaningless and a construction that would avoid overbreadth. Instead, the language of the statute was capable of an interpretation that avoided any constitutional infirmity and comported with legislative intent.

The same was true in *Wallington*, in which the Fifth Circuit interpreted 18 U.S.C. § 1905, a statute making it a

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the statute, the Court must be able to interpret the statute to require the defendant's knowledge that the information was false or misleading. As discussed in the text above, the statute simply does not allow such an interpretation.

crime for an officer or employee of the United States to disclose certain information obtained by the employee in the course of his employment, to require an element of intent in order to avoid an illogical result. *Wallington*, 889 F.2d at 574-75. The Fifth Circuit found that it would be "absurd" to construe the statute to punish the disclosure of any information, regardless of the Government's interest in secrecy. *Id.* at 576. The court found support for its interpretation of the statute in its heading, which was "Disclosure of Confidential Information Generally," and in the fact that certain categories of information specifically listed in the statute are confidential in nature, such as "trade secrets" and "confidential statistical data."[43] *Id.* at 577. Second, the Fifth Circuit interpreted the statute to include a *mens rea* element, specifically, that the employee had to know the information was confidential. The result in *Wallington* is not at odds with the Court's interpretation here. Section 13(a)(2) includes an express *mens rea* element, the issue is how far should the Court extend the scienter requirement beyond the express language used by Congress. The Fifth Circuit was not faced in *Wallington* with a statutory construction that would render any word or element of the statute superfluous, as is the case here.

The Court must assume Congress meant what it wrote and believed that the terms false and misleading were sufficient to support criminal liability. While the words "false" and "misleading" may imply conduct more culpable than the word "inaccurate," and may suggest

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[43] The Court notes that the heading of the statute here is very general and offers no clue to Congress's intent. The heading for § 13 as a whole is "Violations generally; punishment; costs of prosecution." The heading for § 13(a) is "Felonies generally."

more negligent conduct, it cannot be said that statements that are "false" or "misleading" are necessarily made intentionally or knowingly. In legal parlance, the term "false" does not inherently imply intentional wrongdoing. "What is false can be so by intent, by accident, or by mistake." BLACK'S LAW DICTIONARY 618 (7th ed. 1999). In the common law, there is a material distinction between falsity and fraud. To prevail at trial on a fraud claim, a plaintiff must show that (1) the defendant made a material representation that was false, (2) the defendant either knew the representation to be false at the time or asserted it without knowledge of its truth, (3) the defendant intended the plaintiff to act on its representation, and (4) that his reliance on the representation caused him injury. *See Herrmann Holdings Ltd. v. Lucent Technologies Inc.*, 302 F.3d 552, 564 (5th Cir. 2002); *Formosa Plastics Corp. USA v. Presidi Eng'rs & Contrs., Inc.*, 960 S.W.2d 41, 47-48 (Tex. 1998); *Sears, Roebuck & Co. v. Meadows*, 877 S.W.2d 281, 282 (Tex. 1994).[44] Congress is presumed to know that

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[44] The lay definitions of "mislead" and "false" have varying implications. The lay definition of "mislead" is "to lead in the wrong direction, lead into error, as of conduct." RANDOM HOUSE WEBSTER'S DICTIONARY 422 (1993). The commonly understood lay definition of "false" is "not true or correct; uttering what is untrue"; "not genuine"; "counterfeit." *See* RANDOM HOUSE WEBSTER'S DICTIONARY 235 (1993). But, the dictionary contains other definitions for "false" such as "tending to deceive or mislead" and "lying," *id.*, which suggest the actor knowingly leads another astray. As an adverb, "false" means "dishonestly, treacherously," *id.*, again suggesting an intentional act. It is noted, in contrast, that the standard definition of "accurate" is "free from error carefully precise," RANDOM HOUSE WEBSTER'S DICTIONARY 6 (1993), making its antonym "inaccurate" mean "containing error" or "not carefully precise." The terms do not have any implication about intent. In sum, it is possible that Congress believed that the words "false and misleading" included their own intent requirement, while Congress perceived that the term "inaccurate" was more innoccuous

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courts consistently consider intent to be a necessary element of criminal statutes, including statutes regulating "false" information. *See, e.g., United States v. Blanton*, 281 F.3d 771, 774 (8th Cir. 2002) (stating that a violation of 18 U.S.C. § 1623(a), which makes it a crime to "knowingly make any false material declaration" to a court or grand jury, requires knowledge that the statement was false at the time it was made); *United States v. Lange*, 528 F.2d 1280, 1287 (5th Cir. 1976) (holding that 18 U.S.C. § 1001, making it a crime to make a false statement in any matter within the jurisdiction of any agency or department of the United States, requires proof that the defendant intended to give a false statement). Yet, Congress chose to draft § 13(a)(2) in such a way to limit the applicability of a knowledge requirement to the provision of inaccurate reports but not "false" or "misleading" ones. The Court must give effect to Congress's purposeful choice to draft the statute the way it did.

The Court concludes that § 13(a)(2) is constitutionally overbroad because it lacks a requirement that the defendant ***knew*** the false or misleading nature of the reported information forming the basis of the offense of delivery of false or misleading information. Thus, the statute impermissibly sweeps up a significant amount of protected speech in its net. The Court is not authorized to remedy this deficiency by implying a knowledge requirement or some other *mens rea* requirement because the statute is

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and could include negligent conduct, therefore requiring an express *mens rea* modifier. However, this Court cannot decipher Congressional intent in omitting the modifier in connection with the terms "false" and "misleading" with so little information.

not reasonably susceptible to such an interpretation.[45] The Government makes this proposal and offers to prove that Valencia knew she was delivering false information, as alleged in the indictment, but does not offer any explanation for Congress's decision to include the modifier "knowingly" only in connection with inaccurate information. For this reason, Counts One, Two, and Three of the Indictment must be dismissed.

C. Valencia's Motion on Incorrect Application of § 13(a)(2)[46]

1. Valencia's Contentions

Valencia argues § 13(a)(2) is improperly applied to her because there is no allegation that she attempted to manipulate the market price of a commodity in interstate commerce. Valencia argues that § 2(h) precludes the application to her of § 13(a)(2), because natural gas is an "exempt commodity," and because the CEA does not govern physical trades. In a different vein, Valencia also contends that she did not engage in false reporting related to a commodity covered by § 13(a)(2) because there are no contracts for future delivery of West Coast natural gas traded on the futures exchanges.

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[45] There is no basis for the Court to impose a different standard, such as "should have known." *See United States v. Garrett*, 984 F.2d 1402, 1411-13 (5th Cir. 1993); *United States v. Delakoussaye*, 573 F.2d 910, 912-13 (5th Cir. 1978).

[46] For the sake of completeness, the Court addresses Valencia's arguments on the incorrect application of § 13(a)(2) despite the Court's overbreadth ruling above, which largely moots the "incorrect application" argument.

2. The Government's Contentions

The Government points out that Valencia is charged with violating the "reporting prong" of § 13(a)(2). Specifically, she is charged with knowingly reporting fictitious trades of natural gas, including price and volume data. The Government contends that, if the price and volume data on spot trades of natural gas on the West Coast constitutes "market information" within the meaning of the CEA, and if the information was false and tended to affect the price of natural gas, then the conduct violated the statute. The Government also argues that the reporting prong of § 13(a)(2) does not require a showing of intent to manipulate the price of commodities (or futures markets), as the anti-manipulation prong of the statute does.[47] The Government thus contends that the anti-manipulation exception of § 2(h)(1), which only applies to agreements, contracts or transactions in exempt commodities, does not apply.

In addition, the Government argues that natural gas is a commodity that can be the subject of a futures contract and that the only difference between natural gas for delivery to the West Coast and natural gas at the Henry Hub is the transportation cost. Thus, Valencia's argument that West Coast gas is not traded on the futures market amounts to a challenge to the Government's proof and is not grounds for dismissal.

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[47] The common meaning of "manipulation" is "skillful or artful management," and "manipulate" means "to handle, manage, or use, esp. with skill, in some process of treatment or performance" and "to manage or influence by artful skill." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 872 (1966). Thus, the common meaning of the term "manipulation" inherently implies an element of intent.

Finally, the Government disputes Valencia's factual argument that there is no relationship between the price indexes (such as the one published by *Inside FERC*) and the prices of futures contracts.

3. Discussion on Incorrect Application of § 13(a)(2)

Valencia's arguments are rejected. Most of these points have been addressed earlier in this opinion. However, the Court points out that whether Valencia's conduct had an effect on the futures market of index prices for spot trades is an issue not now presented. The Indictment does not allege that Valencia violated the manipulation prong of § 13(a)(2), by manipulating the market price of a commodity in interstate commerce. She is charged with violating the reporting prong of the statute by falsely reporting "market information" that "affects, or tends to affect the price of a commodity in interstate commerce," which does not require proof that prices of commodities or commodities futures contracts were manipulated. In addition, the Court previously rejected Valencia's arguments that § 13(a)(2) does not apply to natural gas, an "exempt" commodity, or to information related to physical transactions.[48] Valencia's argument about "incorrect application"

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[48] In support of her Incorrect Application Motion, Valencia cites the comments of James E. Newsome, chairman of the Commodity Futures Trading Commission in hearings before the Subcommittee on Energy and Air Quality and the Committee on Energy and Commerce in the House of Representatives on February 13, 2002, in which he stated "the CFTC does not regulate trading of energy products on spot (cash) markets or forward markets, which are excluded from our jurisdiction by the CEA." In addition, at the hearing on June 25, 2003, Valencia submitted an October 2002 report by the Energy Information Administration titled "Derivatives and Risk Management in the Petroleum,

(Continued on following page)

of § 13(a)(2) is not a ground for dismissal of Counts One, Two, and Three of the pending Indictment.[49]

III. CONCLUSION AND ORDER

The Court concludes that § 13(a)(2) is not unconstitutionally vague. Because § 13(a)(2) is not ambiguous, the rule of lenity does not apply. The Court also rejects Valencia's contention that the Indictment incorrectly applies § 13(a)(2). The Court, however, concludes that § 13(a)(2) is unconstitutionally overbroad because it does not require

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Natural Gas, and Electricity Industries," which Valencia contends shows that the United States Department of Energy ("DOE") believes that spot transactions are not covered by the CEA. This argument is not persuasive. General comments by the DOE purportedly addressing the jurisdiction of the CFTC are not probative on the issues presented. It is improper for the Court to look beyond the unambiguous language of the statute to determine legislative intent. *United States v. Rodriguez-Rios*, 14 F.3d 1040, 1044-45 (5th Cir. 1994) (recognizing the Supreme Court's admonishment in *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) that "[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances"). The Court has found no exceptional reason justifying deviation from the plain language of the statute in this case.

[49] To the extent Valencia argues as a factual or a legal matter that West Coast transactions of natural gas are not covered by § 13(a)(2), the Court disagrees. As discussed above in connection with Valencia's vagueness motion, the fact that West Coast contracts are not generally traded on the futures exchanges does not take Valencia's conduct outside of the coverage of § 13(a)(2). *See supra* at 18-19. Further, Valencia's argument that West Coast gas is not traded on the futures market amounts to a challenge to the Government's proof that the allegedly false prices reported to *Inside FERC* did not affect the futures market. This is a factual matter not presented in the charges against Valencia at this time. Even if a charge under the manipulation prong of § 13(a)(2) were brought, any issue of the effect of Valencia's conduct would be a factual issue requiring a trial, not grounds for pre-trial dismissal of the charge as a matter of law.

that a defendant know the information he or she reported was false or misleading. The Court cannot imply intent or rewrite the statute to correct this constitutional infirmity because to do so would result in surplusage in Congress' language. It is therefore

ORDERED that Defendant's Vagueness Motion [Doc. # 25] and Incorrect Application Motion [Doc. # 26] are **DENIED**. It is further

ORDERED that Valencia's Overbreadth Motion [Doc. # 27] is **GRANTED**. It is hereby further

ORDERED that Counts One, Two, and Three of the Indictment are **DISMISSED**.

SIGNED at Houston, Texas, this 25th day of August, 2003.

/s/ Nancy F. Atlas
NANCY F. ATLAS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-21217

UNITED STATES OF AMERICA

Plaintiff-Appellant

v.

MICHELLE N VALENCIA

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Opinion 12/17/04 5 Cir., ___, ___ F.3d ___)

(Filed Jan. 13, 2005)

Before DeMOSS, DENNIS, and CLEMENT, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. AND 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. AND 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Harold R. DeMoss
United States Circuit Judge

REHG-4A

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Commodities and Exchange Act

7 U.S.C. § 13. Violations generally; punishment; costs of prosecution

(a) Felonies generally

It shall be a felony punishable by a fine of not more than $1,000,000 (or $500,000 in the case of a person who is an individual) or imprisonment for not more than five years, or both, together with the costs of prosecution, for:

* * *

(2) Any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or to corner or attempt to corner any such commodity or knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, or knowingly to violate the provisions of section 6, section 6b, subsections (a) through (e) of subsection [1] 6c, section 6h, section 6o(1), or section 23 of this title.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	CASE NO. CR H-03-24
VERSUS	§	HOUSTON, TEXAS
MICHELLE M. VALENCIA	§	JUNE 25, 2003
	§	9:01 A.M. TO 12:49
	§	P.M.

MOTION TO DISMISS

(Filed Jul. 03, 2003)

BEFORE THE HON. NANCY F. ATLAS, UNITED STATES DISTRICT JUDGE

* * *

[155] **THE COURT**: Well, that's true. All right.

MR. LEWIS: I mean, he –

MR. REED: And, Your Honor, that's precisely the type of evidence you asked us not to bring here today.

MR. LEWIS: That's my point. That this is exactly what we did not talk with our witness about. And when counsel says he read it, I think it would take me an hour to understand what this says. Essentially, it's a chart with six or seven columns, eight rows. It references to all sorts of statutes, which he has not supplied to the witness. So, I don't think that's at all fair to take away from his testimony that he has provided a foundation for this. Essentially, this is what the law professor that the Court probably didn't want to hear from what it had been testified from.

THE COURT: I understand. But, I guess, one of the issues that you've got to deal with is whether I receive it in evidence or not. I mean, I could take judicial notice of this thing. That's the big picture issue, okay. Forget whether I have it in here in this hearing or not. At some point we're going to have to deal with this document, and whether or not it has any relevance.

Frankly, I think you're better suited or you're better served to take a look at the document and figure out why it's either relevant or not relevant. And, the reality is this thing is by the Energy Information [156] Administration of the United States Department of Energy. We're here on motions to suppress or motions, I guess, to dismiss certain counts because they are either over-board [sic], vague or otherwise incorrectly applied. I don't know what I think about the fact that the Department of Energy thinks one thing and the Justice Department thinks something else regarding the scope of the CFTC Act or some other statute.

MR. LEWIS: I don't know whether the Court has come away thinking that, because I'm not challenging the accuracy of this at all. I'm sure it's accurate.

THE COURT: Okay. The bottom line is, I'm going to receive it simply because it's a public document published by the United States Government, and I think that there are numerous rules of evidence that would allow me to look at this. How relevant it is, I honestly don't know. I'm in the same boat you are. I never saw this before.

MR. LEWIS: Please, I didn't mean to suggest I don't think it's accurate. I'm sure they've got it 100 percent right.

THE COURT: So my proposal to you all is this. You all have heard the testimony. To the extent you think that there is any relevance by way of background or otherwise to the arguments that are made on a constitutional basis to the statute to the subject Counts 1, 2 and 3 for Ms. Valencia, and Count 1 for Mr. Geiger, I invite you to make any final

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IN THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION.

Derivatives and Risk Management in the Petroleum, Natural Gas, and Electricity Industries

October 2002

Energy Information Administration
U.S. Department of Energy
Washington, DC 20585

* * *

including derivatives activities. A primary purpose of Federal banking regulation is to ensure the safety and soundness of individual banks and the U.S. financial system. Bank regulators, therefore, are authorized to regulate affiliates of banks or bank holding companies, regardless of the activities in which they are engaged. Bank regulators rely on three primary means to oversee bank activities: reviewing required reports; requiring adherence to minimum capital standards; and conducting periodic examinations to verify compliance with reporting, capital, and other regulatory requirements. The banking regulators, however, do not regulate the specific transactions or maintain oversight of OTC derivatives as a class of instruments.

Finally, derivatives may also fall under the jurisdiction of a State insurance regulator. Like banking regulators, State insurance regulators generally regulate the overall activities of their regulatees, including the types of transactions or trading activities in which they may engage. Thus, a State regulator may indirectly regulate derivative

trading activity by allowing or not allowing insurance companies to engage in such activity.

In summary, OTC derivatives may fall into one of four general regulatory jurisdictions – CFTC, SEC, a banking regulator or an insurance regulator – or none at all. For transactions falling within the purview of the CEA, the transactions themselves as well as those offering the contracts fall under the regulatory scheme of the CFTC. If a contact [sic] is either exempt from or excluded from the CEA but is either a security product or offered or entered into by an SEC, banking registrant, or insurance company, the contract would be regulated under the regulatory authority of the SEC or the relevant banking or insurance regulator. If the contract does not fall within the regulatory authority of the SEC or banking or insurance regulator, it would be subject only to general commercial laws.

Table 14. CEA and CFTC Exemptions and Exclusions for OTC Derivative Transactions

Exemption or Exclusion	Type of Exemption or Exclusion	Commodity	Trader	Conditions	Retained Rules
Forward Contract Exclusion: 1a(19) of CEA	Statutory exclusion	All	No restriction	Any sale of any cash commodity for deferred shipment or delivery	None
Exclusion for Hybrid Instruments: 2(f) of CEA	Statutory exclusion	All	No restriction	Hybrid instruments that are predominantly securities as defined in the exclusion	None
Exclusion for Swap Transactions: 2(g) or CEA	Statutory exclusion	All non-agricultural	Eligible contract participants[a]	Transactions subject to individual negotiation and not executed on a trading facility	None
Transactions in Exempt Commodities: 2(h)(1)	Statutory exemption	Exempt commodities[b]	Eligible contract participants	Transactions not executed on a trading facility[c]	Anti-fraud and anti-manipulation
Exempt Commercial Markets: 2(h)(3)	Statutory exemption	Exempt commodities	Eligible commercial entities	Transactions executed on an electronic trading facility[d]	Anti-fraud and anti-manipulation rules related to transaction information dissemination as prescribed by the Commission if found to be a price discovery market
Trade Option Exemption CFTC Part 32.4(a)	Regulatory exemption	All non-enumerated agricultural commodities[e]	Commercial entities[f]	One party must be a commercial entity using the option for purposes related to it [sic] business	Anti-fraud
Hybrid Instrument Exemption: CFTC Part 34	Regulatory exemption	All	No restriction	Hybrid must be predominantly a security or banking product as measured by CFTC prescribed predominance test	None (Securities or bank products must be subject to regulation by the SEC or a banking regulator)
Swap Exemption: CFTC Part 35	Regulatory exemption	All	Eligible swap participants[g]	Not part of a fungible class of agreements that are standardized; creditworthiness is a material consideration, not traded on a multilateral transaction execution facility	Anti-fraud and anti-manipulation
Energy Order: 53 FR 21286 (April 20, 1993)	Regulatory exemption	Crude oil, natural gas, natural gas liquids and their derivative products	Commercial participants in the energy markets	Transactions between principals and subject to individual negotiation, no unilateral right of offset	None

* * *

[a] Defined in §1a(12) of the CEA.

[b] Defined in §1a(14) of the CEA.

[c] Defined in §1a(33) of the CEA.

[d] Defined in §1a(10) of the CEA.

[e] The "enumerated commodities" are listed in §1a(4) of the CEA and generally include the major domestically produced field crops and livestock.

[f] Part 32.4 of the CFTC's regulations limits users of trade options to producers, processors, or commercial users of, or merchants handling a commodity, or byproducts of such commodity.

[g] Defined in §35.1(b)(2) of the CFTC's regulations.

Legislative History of the Commodity Exchange Act

Grain Futures Act of 1922 (42 Stat. 998)

The Grain Futures Act of 1922 was enacted in response to speculative excesses and price manipulation on the grain exchanges during a period of declining commodity prices and a farming depression.[1] The regulatory framework established by the act relied primarily on exchange self-governance, subject to the Secretary of Agriculture's oversight. Among its major provisions, the 1922 act

- prohibited off-exchange trading of futures on an enumerated commodity (corn, wheat, oats, barley, rye, flax, and sorghum) if a futures contract on that enumerated commodity is traded on a board of trade designated as a contract market by the Secretary of Agriculture;
- imposed conditions for designation as a contract market, including requiring boards of trade to adopt rules for (1) disseminating market information, (2) preventing dissemination of false information, (3) preventing manipulations, and (4) maintaining records and providing reports;
- excluded contracts for deferred shipment or delivery – forwards – from regulation under the act;
- authorized the Secretary of Agriculture to investigate the operations of boards of trade;

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[1] In 1921 Congress enacted the Futures Trading Act, which imposed a tax on grain futures transactions that were not consummated on an exchange designated as a contract market by the Secretary of Agriculture. The statute was held unconstitutional as an improper exercise of the taxing power provided in the Constitution. The Grain Futures Act of 1922 reenacted the statute's regulatory provisions, but omitted its unlawful taxing power provisions.

- established a commission composed of the Secretary of Agriculture, Secretary of Commerce, and the Attorney General to (1) suspend a board of trade's designation as a contract market if the board failed to comply with or enforce conditions of designation; (2) review a denial of designation by the Secretary of Agriculture; and (3) suspend any person's trading privileges on the basis of evidence presented by the Secretary of Agriculture that the person violated the act, attempted a manipulation, or violated antimanipulation rules; and
- imposed criminal (misdemeanor) sanctions for off-exchange trading in the enumerated commodities and the dissemination of false information that could affect grain prices.

Commodity Exchange Act of 1936 (49 Stat. 1491)

The Commodity Exchange Act (CEA) of 1936 was passed after the grain price collapse of 1933 – believed to be a result of continued market manipulation and the failure of a large brokerage house. The act provided for more extensive regulation of the markets and their participants. Among its major provisions, the 1936 act

- added cotton, rice, mill feeds, butter, eggs, and Irish potatoes to the enumerated commodities subject to the act;
- expanded the prohibition against off-exchange trading to any futures contract on an enumerated commodity;
- prohibited options on the enumerated commodities;
- provided for the Secretary of Agriculture to (1) impose limits on speculative trading in futures or in the underlying commodity (speculative position limits) and (2) specify thresholds for the mandatory reporting of

large positions in futures or in the underlying commodity (large trader reporting);

- specifically outlawed fraudulent conduct in connection with futures trades by members of contract markets and certain affiliated persons; prohibited specific forms of sham trading and any transaction used to cause an artificial price; and required registration of futures commission merchants (FCM) and floor brokers;

- authorized the Secretary of Agriculture to suspend the trading privileges of any person who violated the act or related regulations and to suspend or revoke the registrations of FCMs and floor brokers;

- expanded the activities subject to criminal (misdemeanor) sanctions to include fraud, manipulation, off-exchange trading, and violations of speculative trading limits and registration requirements;

- designated the commission established under the Grain Futures Act as the Commodity Exchange Commission and authorized it to (1) establish and enforce the speculative trading limits and (2) issue a cease and desist order (rather than withdrawal of designation) to contract markets that violated the act or related rules and regulations; and

- changed the name of the Grain Futures Act of 1922 to the "Commodity Exchange Act."

Amendments to the CEA Between 1936 and 1968

In 1938, wool tops were added to the commodities subject to the act; and in 1940, fats and oils, cottonseed, cottonseed meal, peanuts, soybeans, and soybean meal were added. Wool (as distinguished from wool tops) was added in 1954, and the act was made applicable to onions in 1955. In 1958, the act was

amended to prohibit futures trading in onions but did not remove onions from the list of commodities covered by the act.

1968 Amendments to the CEA (Pub. L. No. 90-258)

As the futures markets grew, additional measures were considered necessary to protect the public interest and enhance regulatory effectiveness. Among their major provisions, the 1968 amendments

- expanded the prohibition against fraudulent conduct to apply to any person acting in connection with an exchange-traded futures contract;
- required FCMs to satisfy minimum net financial requirements pursuant to regulations of the Secretary of Agriculture or rules of a designated contract market;
- enhanced enforcement under the act by (1) requiring registrants (FCMs and floor brokers) to make required reports and maintain and grant access to books and records, (2) requiring designated contract markets to enforce their bylaws and rules related to the terms and conditions of futures contracts and member FCM minimum financial standards, (3) authorizing the Commodity Exchange Commission to suspend the designation of a board of trade that failed to enforce its rules, (4) authorizing the Secretary of Agriculture to use cease and desist orders, and (5) increasing criminal penalties (from misdemeanor to felony) for defalcation of customer funds and manipulation and distribution of false information to affect commodity prices; and
- added livestock, livestock products, and frozen concentrated orange juice to the commodities enumerated for regulation under the act.

Commodity Futures Trading Commission Act of 1974 (Pub. L. No. 93-463)

After the enactment of the 1968 amendments to the CEA, the federal government stopped using stockpiles of commodities to stabilize prices, thereby allowing prices to fluctuate freely on the basis of market supply and demand factors. The greater price volatility brought commercials into the market who sought to protect themselves from the risks associated with wide price swings as well as the general public, including speculators, who hoped to profit from them. As a result, the futures market began to play an increasingly important role in the pricing of the nation's commodities. In passing the Commodity Futures Trading Commission (CFTC) Act of 1974, Congress concluded that the economic significance of futures trading had reached a level that warranted expanding the scope of regulation to cover unregulated commodities as well as creating an independent agency to regulate the market. Among its major provisions, the 1974 act

- expanded CEA coverage from the statutory list of enumerated physical commodities to include futures contracts on all goods, articles (except onions), services, and rights and interests, thereby defining the term commodity to include anything on which a contract is traded (except onions);
- created an independent regulatory agency, CFTC, and provided it with, among other things,

- exclusive jurisdiction over all transactions involving futures contracts, options,[2] and leverage transactions on gold and silver bullions and coins;
- enhanced enforcement and oversight powers, including authority to impose civil money penalties for certain violations;
- reparations authority; and
- authority to order exchanges to act in a market emergency;

- included the Treasury Amendment, which excluded certain transactions from coverage under the act, including transactions involving foreign currencies and U.S. government securities;[3]
- created three new classes of registrants – (1) commodity trading advisors, (2) commodity pool operators, and (3) associated persons of FCMs;
- provided for the creation and registration of registered futures associations to enhance industry self-regulation and facilitate increased public and commercial participation in the futures markets;
- increased criminal penalties for violations of the antifraud, antimanipulation, and certain other provisions of the act; and
- authorized appropriations for fiscal years 1975 through 1978.

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[2] The 1974 amendments preserved the prohibition on options on commodities listed in the act before the 1974 amendments – the enumerated commodities.

[3] The amendment clarified that the CEA did not prohibit off-exchange trading in foreign currencies and certain other financial instruments.

Futures Trading Act of 1978 (Pub. L. No. 95-405)

During hearings on the Futures Trading Act of 1978, CFTC was criticized for ineffective management and failure to fully implement the 1974 act. Transferring some or all of CFTC's functions to the U.S. Department of Agriculture, Department of the Treasury, the Securities and Exchange Commission (SEC), or any combination of these agencies was discussed, but related action was not taken. Among its major provisions, the 1978 act

- required CFTC to consult with the Department of the Treasury, the Board of Governors of the Federal Reserve System, and SEC about (1) CFTC activities that relate to the responsibilities of these agencies; and (2) the relationships among futures trading, securities, and other financial instruments;
- provided CFTC authority to develop a user-fee system to offset the costs of regulation;
- authorized states to bring judicial actions against persons other than contract markets, clearinghouses, and floor brokers to enforce the CEA or CFTC regulations;
- increased criminal penalties for certain violations;
- imposed restrictions on options trading until CFTC reported to Congress on its ability to regulate such trading;
- authorized CFTC to prohibit or regulate leverage transactions in non-agricultural commodities; and
- authorized appropriations for fiscal years 1979 through 1982.

Futures Trading Act of 1982 (Pub. L. No. 97-444)

The Futures Trading Act of 1982 addressed issues arising from the continued expansion of the financial futures markets and increased commercial and public participation in the futures markets, including the silver market crisis of 1979 and 1980. Among its major provisions, the 1982 act

- codified the Shad-Johnson Jurisdictional Accord, a 1981 agreement between CFTC and SEC that clarified their jurisdictions with respect to securities-related instruments by
    - granting CFTC exclusive jurisdiction over futures on a group or an index of securities as well as options on such futures, subject to certain conditions, including (1) cash settlement or some other means of settlement not calling for transfer of a covered security, (2) adequate antimanipulation safeguards, and (3) a general prohibition on over concentration of a covered index or group of securities;[4]
    - excluding from CFTC jurisdiction options on any security or group or index of securities;[5] and
    - prohibiting futures contracts on individual securities that are subject to SEC regulatory oversight;
- removed the ban on options on the enumerated commodities and authorized CFTC to establish a pilot program for trading such options;

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[4] These contracts were also subject to initial SEC review for compliance with the three requirements listed in the text.

[5] Separate legislation granted SEC jurisdiction over these instruments.

- established a 1 year time limit for CFTC decisions on applications for contract market designation;
- provided for judicial review of a CFTC determination that a market emergency exists;
- required CFTC to regulate leverage transactions in nonagricultural commodities, subject to a public interest consideration;
- enhanced CFTC registration authority and provided for statutory disqualification;
- authorized registered futures associations to perform CFTC registration functions and required them to establish CFTC-approved member standards for training, solicitations, and financial integrity;
- authorized the states to enforce CEA antifraud provisions in state courts against all registrants, except floor brokers and registered futures associations, and provided for state regulation of off-exchange instruments;
- ordered federal financial regulators (the Federal Reserve, CFTC, and SEC, with assistance from the Department of the Treasury) to study the effects of trading futures and options on the U.S. economy;
- authorized private rights of action against most registrants for violation of the act; and
- authorized CFTC appropriations through fiscal year 1986.

Futures Trading Act of 1986 (Pub. L. No. 99-641)

Among its major provisions, the Futures Trading Act of 1986

- enhanced CFTC enforcement powers by (1) clarifying that CEA antifraud provisions apply to off-exchange instruments and not just exchange-traded instruments and (2) authorizing extraterritorial service of administrative subpoenas;
- removed pilot status from exchange-traded agricultural options and authorized permanent, general regulation of such options by CFTC;
- prohibited leverage transactions in commodities other than silver, gold, and platinum and required CFTC to coordinate a study of leverage transactions; and
- authorized appropriations through fiscal year 1989.

Futures Trading Practices Act of 1992
(Pub. L. No. 102-546)

By authorizing CFTC to grant exemptions from most provisions of the CEA, the Futures Trading Act of 1992 provided a means of alleviating (1) the legal uncertainty for the multitrillion-dollar over-the-counter derivatives market and (2) the regulatory burden on futures exchanges. The act also addressed trade practice, recordkeeping, and corporate governance issues that surfaced in 1989 as a result of (1) Federal Bureau of Investigation undercover sting operations at selected futures exchanges and (2) the declaration of an emergency in the soybean market. In addition, the act addressed concerns that surfaced during the market crash of 1987 about the need for greater international cooperation and coordination and for more information on material affiliated persons – those entities

with a relationship to an FCM such that their business activities were reasonably likely to have a material impact on the financial and operational condition of the FCM. Among its major provisions, the 1992 act

- authorized CFTC to exempt any contract from almost all provisions of the CEA, including the exchange-trading requirement;
- established stringent exchange audit trail requirements;
- established trading restrictions and disclosure requirements for associated floor brokers;
- required registered futures associations and boards of trade to provide for fair representation of interests in self-governance and disciplinary proceedings and public disclosure of major violations of pertinent rules;
- required exchanges to adopt conflict-of-interest rules;
- required registered futures associations to establish supervisory guidelines to curb telemarketing fraud;
- granted oversight authority for setting margins on stock-index futures and options thereon to the Federal Reserve;
- enhanced registration fitness and disqualification criteria, strengthened enforcement powers and sanctions, increased criminal penalties for certain violations of the act, and added criminal sanctions for insider trading;
- directed CFTC to facilitate the development and operation of computerized trading as an adjunct to open outcry,
- required ethics training for registrants;

- required CFTC to study the effects of CFTC-imposed penalties, the competitiveness of domestic boards of trade with foreign boards of trade, and the potential for computerized trading;
- encouraged CFTC cooperation with and participation in actions by foreign futures authorities;
- authorized CFTC to collect information from FCMs about the activities and financial condition of material affiliated persons for use in assessing the risks that they pose to the FCM;
- prohibited insider trading by self-regulatory organization employees or officials; and
- authorized appropriations through fiscal year 1994.

CFTC Reauthorization Act of 1995 (Pub. L. No. 104-9)

The CFTC Reauthorization Act of 1995 authorized appropriations through fiscal year 2000.

Omnibus Appropriations Act of 1998
(Pub. No. 105-277)

In response to concerns of Congress, federal financial market regulators, and market participants that CFTC intended to propose or issue new regulations covering swaps and hybrid financial instruments, the Omnibus Appropriations Act of 1998 prohibited CFTC from taking such action until March 31, 1999.